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Supreme Court, U.S.
FILED

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No. (1)

IN THE

SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF:

J. G., (a.k.a. J.M.G. and J.M.S.)

On Petition for Writ of Certiorari
To The Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI

James A. Dickens
Counsel of Record
Guilford County
Dept. of Social Services
1203 Maple Street
Greensboro, NC 27405
(336) 641-6266

QUESTIONS PRESENTED

The juvenile, J.G., is in the legal and physical custody of the Petitioner, the Guilford County Department of Social Services, and he receives social security survivor's benefits on behalf of his deceased father. The Petitioner is the "representative payee" of the juvenile's social security benefits. 42 U.S.C. §407(a) states that these funds are not subject to "execution, levy, attachment, garnishment, or other legal process." This case presents the following questions:

Do state courts have concurrent jurisdiction to direct the Social Security Administration to make payments to someone other than the beneficiary or representative payee?

In a dispute between the representative payee and the beneficiary, does a state court violate 42 U.S.C. §407(a) when on behalf of the beneficiary, it orders the payee to use a portion of the beneficiary's social security benefits to pay an outstanding debt to a creditor of the beneficiary?

LIST OF PARTIES

Petitioner:

The Guilford County Department of Social Services:

John Shore was the director of the Department when this matter was originally filed. Robert Williams is Mr. Shore's successor, and the current director of the Guilford County Department of Social Services.

Respondent:

J.G., a/k/a J.M.G., a/k/a J.M.S., by and through the North Carolina Guardian ad *Litem* Program.

Lewis Pitts, Attorney Advocate for the Juvenile, J.G.

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IN THE MATTER OF J.G. (a/k/a J.M.G. a/k/a J.M.S.) 362 N.C. 176 (2008) A1

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IN THE MATTER OF J.G. (a/k/a J.M.G. a/k/a J.M.S.) ___ N.C. App. ___, 652 S.E.2d 266 (2007) A22

POMS- PR 07211.025 Michigan A48

PR 07211.046 South Dakota A56

PR 07211.055 Wisconsin A61

TABLE OF AUTHORITIES

Cases

Washington State Department of Social and Health Services, et. al. vs. Guardianship Estate of Danny Keffeler, et. al. 537 U.S. 371; 123 S. Ct. 1017; 154 L. Ed 2d 972 (2003) 14

U.S. Code Provisions

28 U.S.C. §1257(a) 1

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OPINIONS BELOW

The Supreme Court of North Carolina's Order denying Petitioner's Petition for Discretionary Review is reported at 362 N.C. 176 (2008); 2008 N.C. LEXIS 46 (2008). Appendix (App.) at A1.

The North Carolina Court of Appeals' Order affirming the District Court's Order is reported at____ N.C. App. _____, 652 S.E.2d 266 (2007); 2007 N.C. App. LEXIS 2252 (2007). App. at A22.

JURISDICTION

The decision of the North Carolina Courts was final upon denial of review by the Supreme Court of North Carolina on 24 January 2008. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 407(a)- The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

U.S. FEDERAL CODE OF REGULATIONS PROVISIONS (2005)

§404.2035 Responsibilities of a representative payee.

A representative payee has a responsibility to---

(a) Use the payments he or she receives only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines, under the guidelines in this subpart, to be in the best interests of the beneficiary;

(b) Notify us of any event that will effect the amount of benefits the beneficiary receives or the right of the beneficiary to receive benefits;

(c) Submit to us, upon our request, a written report accounting for the benefits received; and

(d) Notify us of any change in his or her circumstances that would affect performance of the payee responsibilities.

404.2040 Use of benefit payments.

(a) *Current maintenance.* (1) We will consider that payments we certify to a representative payee have been used for the use and benefit of the beneficiary if they are sued for the beneficiary's current maintenance. Current maintenance includes cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items.

Example: An aged beneficiary is entitled to a monthly Social Security benefit of $440. Her son, who is her payee, disburses her benefits in the following manner:

Rent and utilities	$200
Medical	25
Food	60
Clothing (coat)	55
Savings	30
Miscellaneous	30

The above expenditures would represent proper disbursements on behalf of the beneficiary.

(2) Notwithstanding the provisions of paragraph (a)(1) of this section, if a beneficiary is a member of an Aid to Families With Dependent Children (AFDC) assistance unit, we do not consider it inappropriate for a representative payee to make the benefit payments available to the AFDC assistance unit.

(3) *Institutional care.* If a beneficiary is receiving care in a Federal, State, or private institution because of mental or physical incapacity, current maintenance includes the customary charges made by the institution, as well as expenditures for those items which will aid in the beneficiary's recovery or release from the institution or expenses for personal needs which will improve the beneficiary's condition while in the institution.

Example: An institutionalized beneficiary is entitled to a monthly Social Security benefit of $320. The

institution charges $700 a month for room and board. The beneficiary's brother, who is the payee, learns the beneficiary needs new shoes and does not have any funds to purchase miscellaneous items at the institution's canteen.

The payee takes his brother to town and buys him a pair of shoes for $29. He also takes the beneficiary to see a movie which costs $3. When they return to the institution, the payee gives his brother $3 to be used at the canteen.

Although the payee normally withholds only $25 a month from the Social Security benefit for the beneficiary's personal needs, this month the payee deducted the above expenditures and paid the institution $10 less than he usually pays.

The above expenditures represent what we would consider to proper expenditures for the current maintenance.

(c) *Support of legal dependant.* If the current maintenance needs of the beneficiary are met, the payee may use part of the payments for the support of the beneficiary's legally dependent spouse, child, and/or parent.

Example: a disabled beneficiary receives a Veterans Administration (VA) benefit of $325 and a Social Security benefit of $525. The beneficiary resides in a VA hospital, and his BA benefits are sufficient to provide for all of his needs. The beneficiary's legal dependents-his wife and two children- have a total income of $250 per month in Social Security benefits However, they have expenses of approximately $450 per month.

Because VA benefits are sufficient to meet the beneficiary's needs, it would be appropriate to use part of his Social Security benefits to support his dependents.

(d) *Claims of creditors.* A payee may not be required to use benefit payments to satisfy a debt of the beneficiary, if the debt rose prior to the first month for which payments are certified to a payee. If the debt arose prior to this time, a payee may satisfy it only if the current and reasonably needs of the beneficiary are met.

Example: A retroactive Social Security check in the amount of $1,640, representing benefits due for July 1980 through January 1981 was issued on behalf of the beneficiary t the beneficiary's aunt who is the representative payee. The check was certified in February 1981.

The nursing home, where the beneficiary resides, submitted a bill for $1,139 to the payee for maintenance expenses the beneficiary incurred

during the period from June 1980 through November 1980. (Maintenance charges for December 1980 through February 1981 had previously been paid.)

Because the benefits were not required for the beneficiary's current maintenance, the payee had previously saved over $500 for the beneficiary and the beneficiary had no foreseeable needs which would require large disbursements, the expenditure for the maintenance charges would be consistent with our guidelines.

§404.2041 Who is liable if your representative payee misuses your benefits?

(a) A representative payee who misuses your benefits is responsible for paying back misused benefits. We will make every reasonable effort to obtain restitution of misused benefits so that we can repay these benefits to you.

(b) Whether or not we have obtained restitution from the misuser, we will repay benefits in cases when we determine that a representative payee misused benefits and the representative payee is an organization or individual payee serving 15 or more beneficiaries. When we make restitution, we will pay you or your alternative representative payee an amount equal to the misused benefits less any amount we collected from the misuser and repaid you.

(c) Whether or not we have obtained restitution from the misuser, we will repay benefits in cases when we determine that an individual representative payee serving 14 or fewer beneficiaries misused benefits and our negligent failure in the investigation or monitoring of that representative payee results in the misuse. When we make restitution, we will repay you or your alternative representative payee an amount equal to the misused benefits less any amount we collected from the misuser and repaid to you.

(d) The term "negligent failure" used in this subpart means that we failed to investigate or monitor a representative payee or that we did investigate or monitor a representative payee but did not follow established procedures in our investigation or monitoring. Examples of our negligent failure include, but are not limited to, the following:

(1) We did not follow our established procedures in this subpart when investigating, appointing, or monitoring a representative payee; or
(2) We did not timely investigate a reported allegation of misuse; or
(3) We did not take the necessary steps to prevent the issuance of payments to the representative payee after it was determined that the payee misused benefits.

(e) Our repayment of misused benefits under these provisions does not alter the representative payee's liability and responsibilities as described in paragraph (a) of this section.

STATEMENT OF THE CASE

At the time these proceedings began, the juvenile, J.G., was fifteen years old. Tracy Studivent (hereinafter "Studivent") married J.G.'s biological mother on 16 August 1991, and after the district court terminated the parental rights of J.G.'s biological father, Studivent married J.G.'s biological mother and legally adopted J.G. as his own son on 15 December 1992. J.G.'s biological mother abandoned

the family in April 1993, and the district court terminated her parental rights on 14 January 1994. Studivent died of cancer a month later on 3 February 1994, and Studivent left a will devising all of his property, including a Habitat for Humanity house, to a testamentary trust for the benefit of J.G. until he turned eighteen years of age. Additionally, as Studivent's legally adopted son, J.G. received Social Security Survivor's (hereinafter, "SSS") benefits after his death.

Studivent named Connie Bell as J.G.'s guardian to care for J.G. and to live with J.G. in the Habitat for Humanity house he had purchased before his death. J.G. initially came into DSS custody on 3 October 1997 as a result of an abuse petition filed against Connie Bell. As a result of these proceedings, J.G. was placed in foster care with his maternal aunt, Arnita Gibson, who adopted J.G. in March 2003 and lived with him in the house his adoptive father had left for him. J.G.'s adoption terminated his DSS case, and as his adoptive mother, Ms. Gibson became the representative payee of J.G.'s SSS benefits.

On 26 July 2004, J.G. was again placed into DSS custody as a result of the violation of his probation for an adjudication of delinquency three separate juvenile petitions. While J.G. was in DSS custody, his adoptive mother, Arnita Gibson, and her boyfriend, William Gilmer, continued to live in the house left in trust to J.G. On 28 March 2005, while J.G. was still in the custody of DSS, J.G.'s adoptive mother, Arnita Gibson, relinquished her parental rights to him, and subsequent to the relinquishment of her parental rights, Arnita Gibson and Willie

Gilmer abandoned J.G.'s house and stopped making the mortgage payments. *Id.* When J.G. was placed into DSS custody on 26 July 2004, DSS became J.G.'s representative payee of his SSS benefits. *Id.* DSS applied his monthly benefit check in the amount of approximately $538.00 toward the cost of his foster care which was approximately $1,333.00 per month at the time of this hearing. J.G.'s house remains vacant while he is in foster care, and DSS has no plans to place him in the house while he is in DSS custody.

On 2 December 2005, this matter came on for a custody review hearing pursuant to N.C.G.S. §7B-906 and a "Motion of Guardian ad *Litem* to Protect the Reasonably Foreseeable Needs of [J.G.] filed on 23 November 2005. R., p. 150. At the time this motion was filed, J.G.'s house was valued at approximately $80,000.00. Habitat for Humanity held the mortgage in the amount of approximately $27,000.00 with monthly payments of $221.00. At the hearing, the GAL, Anne Moore, and her supervisor, Amy Townsend, testified that in their opinion, it would be in J.G.'s best interest for DSS to make the monthly mortgage payments on J.G.'s house to preserve it for when he reaches majority age in three years. The Attorney Advocate for the GAL, Lewis Pitts, argued DSS had a fiduciary and federal statutory duty to distribute J.G.'s SSS benefits for J.G.'s sole use and benefit. He argued that the distribution of J.G.'s SSS benefits had to be prioritized to ensure that the "current and reasonably foreseeable needs of the beneficiary are met." He further argued that North Carolina law as well as the Federal Adoption and Safe Families Act required DSS, as legal guardian of the juvenile, to

act in J.G.'s best interest. The Attorney Advocate argued that DSS failed to distribute the juvenile's monthly SSS benefits in a manner so as to maintain the monthly mortgage on J.G.'s house. He alleged that DSS did not act in J.G.'s best interest, because DSS used all of J.G.'s SSS benefits to pay for the cost of his foster care, and J.G. had no legal obligation to repay DSS or any other state agency for the care and services he received as a foster child. He further argued that prior to court action, attempts were made by Habitat for Humanity and the GAL to request DSS to make these mortgage payments so that the juvenile would have housing when he aged out of foster care. No payments were made and foreclosure was being considered. He also argued that the district court had jurisdiction under Chapter 7B of the North Carolina General Statutes to ensure DSS used J.G.'s SSS benefits in his best interests, and that included ordering DSS to use those benefits to pay the mortgage on J.G.'s house.

DSS's attorney, Lynne G. Schiftan, argued that the district court lacked subject matter jurisdiction under both federal and state law to order DSS, as the representative payee of J.G.'s SSS benefits, to use these benefits to pay the mortgage on J.G.'s house. DSS argued that the Social Security Administration administers SSS benefits, and the Social Security regulations allowed DSS, as representative payee, to reimburse itself for the costs of J.G.'s foster care. When DSS became J.G.'s representative payee of his Social Security benefits, DSS applied his $538.00 in monthly benefits toward the cost of his foster care which was approximately $1,333.00 per month at the time of the hearing before the district court. DSS argued it was not a

conflict of interest for a department of social services to use a juvenile's Social Security benefits to pay the costs of foster care for the juvenile. DSS also argued that the Social Security Administration in its Program Operations Manual System (POMS) has held that pursuant to 42 U.S.C. §407(a), a state court may not direct the disposition of Social Security or SSI benefits paid to a representative payee to some other person or entity. Specifically, DSS presented the following POMS rulings to the district court: PR 07211.025 Michigan PR 07211.046- South Dakota, PR 07211.055 Wisconsin, PR 03-172. App. A48-74.

On 20 December 2005, the Honorable Susan E. Bray, District Court Judge presiding, entered an

Order directing the Guilford County Department of Social Services to use the juvenile's social security survivor's benefits to pay the monthly mortgage on a Habitat for Humanity house the juvenile inherited from his adoptive father, $2,800 in delinquent mortgage payments on this house, and $1,000 toward the cost of repairs to the house. R., p. 150-165.

The district court found that:

> The Department's utilization of [J.G.'s] social security benefits has not been reasonable in that those monies have been used to reimburse the County for [J.G.'s] room and board and not to pay the $221 house payment on [J.G.'s] Habitat house that he will need as a residence

> when he leaves the group home or foster care."

App. at A13.

As a result of this finding and others, the Court ordered DSS use a portion of J.G.'s SSS benefits to pay the monthly mortgage on his home. The Court further ordered DSS to pay $2,800.00 for the past-due mortgage payments on the house plus an additional $1,000 for repairs to the house.

DSS filed Notice of Appeal to the North Carolina Court of Appeals on 21 December 2005. DSS argued that "because federal law governs Social Security benefits, North Carolina state courts are preempted and therefore lack subject matter jurisdiction to enter orders affecting such benefits." App. at A32. DSS also argued that the district court's 20 December 2005 Order violated the anti-alienability provision of 42 U.S.C. 407(a). App. at A40-41. The Court of Appeals held that state courts may exercise concurrent jurisdiction along with federal courts in the area of resolving disputes between a representative payee and a beneficiary concerning the use of benefits. App. at A40. The Court of Appeals also held that the intent of Congress in enacting 42 U.S.C. §407(a) was to protect the beneficiary against the claims of creditors, and it did not apply to disputes between the beneficiary and the representative payee. App. at A44.

DSS filed a Petition for Discretionary Review with the Supreme Court of North Carolina on 11 December 2007 alleging that the decision of the

Court of Appeals conflicted with an earlier panel's interpretation of 42 U.S.C. §407(a), which held that this statue barred the North Carolina District Courts from ordering a representative payee to pay over to the court or to the plaintiff any part of the Social Security benefits he or she received or might receive in the future as a representative payee for the beneficiary. App. at _A38. The Supreme Court of North Carolina denied the Petition on 24 January 2008. App. at A1

REASONS FOR GRANTING CERTIORARI

Petitioner contends that this Court should issue its Writ of Certiorari to the North Carolina Court of Appeals, because the decision of the Court of Appeals is now binding precedent in North Carolina for the proposition that the anti-alienability provision of 42 U.S.C. §407(a) is not applicable between disputes between the representative payee of the juvenile and the juvenile's Guardian ad *Litem*. Any judge in juvenile court can now override the representative payee's discretion in determining how best to use the juvenile's Social Security benefits for the juvenile's best interest. Under the facts of this case, there is no dispute that the Petitioner was using the juvenile's Social Security benefits for the current maintenance of the juvenile, which according to the Social Security Administration's Regulations were presumptively used for the use and benefit of the beneficiary. *See* 20 C.F.R. §404.2040. Despite Petitioner's use of the juvenile's Social Security benefits in accordance with the Social Security Administration's regulations, the Court of Appeals ruled that the Petitioner was not

using these benefits in the best interest of the juvenile, and ordered Petitioner to use a portion of the juvenile's Social Security Survivor's benefits to pay the juvenile's creditors.

The Court of Appeals acknowledged that this Court plainly stated in the case of *Washington State Dep't of Social & Health Services v. Guardianship of the Estate of Keffeler*, 537 U.S. 371, 123 S. Ct. 1017, 154 L. Ed. 2d at 972, that "[Section] 407 does not refer to any "claim of creditors"; it imposes a broad bar against the use of any legal process to reach all Social Security benefits." *Keffeler*, 537 U.S. at 382, 154 L. Ed. 2d at 985 (quoting Philpott, 409 U.S. at 417, 34 L. Ed. 2d at 612). Nevertheless, the Court of Appeals went on to hold that "the focus of section 407(a) is to protect Social Security beneficiaries against claimants to Social Security benefits" and continued to emphasize that the primary purpose of the statute was to protect beneficiaries from creditors. App. at A43-44.

The Court of Appeals reasoned that since the dispute was between the beneficiary and the juvenile's representative payee, section 407(a) did not apply. The Court of Appeals, however, did not cite one federal decision to support this holding. Instead it relied on a variety of state court rulings. This issue is an issue that has not been, but should be settled by this Court. Otherwise, Guardian ad *Litems* and child welfare advocates across the country will soon be filing suits against representative payees to challenge their use of the beneficiary's Social Security benefits, even if payees

are using the benefits in accordance with the Social Security regulations.

In rejecting Petitioner's argument that federal law governed the use and disposition of the juvenile's Social Security benefits, and that state courts were preempted from entering orders affecting these benefits, the Court of Appeals expressly held that "[i]n accordance with the greater weight of authority, '[w]e agree with those courts that allow state courts to look into the expenditure of dependent social security benefits when an interested party questions the propriety of those expenditures.'" App. at A40. Again, the Court of Appeals cited no federal authority for this proposition, and Petitioner has not found any federal cases that hold that state courts hold concurrent jurisdiction over the Social Security Administration Regulations codified in the Code of Federal Regulations.

Even if this Court were to agree with the North Carolina Court of Appeals that state courts exercise concurrent jurisdiction to administer federal Social Security regulations, the Court of Appeals did not follow the federal regulations, but instead, substituted its own definition of what the best interests of the juvenile were in regards to the use of his Social Security benefits. Again, it is undisputed that the Petitioner was using those benefits for the juvenile's current maintenance.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the 6 November 2007 Order of the North Carolina Court of Appeals and the Supreme Court of North Carolina.

/s/ James A. Dickens
James A. Dickens
DSS Attorney
1203 Maple Street
Greensboro, NC 27405

LEXSEE

IN THE MATTER OF: J.G., (a.k.a J.M.G. and J.M.S.)

No. 586P07

SUPREME COURT OF NORTH CAROLINA

362 N.C. 176, 2008 N.C. LEXIS 46

January 24, 2008, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: [*1]
Appealed by Guilford County DSS. From NC Court of Appeals. (06-752). From Guilford. (97 J 697).
In re J.G., 652 S.E.2d 266, 2007 N.C. App. LEXIS 2252 (N.C. Ct. App., 2007)

COUNSEL: Mr. James A. Dickens, Attorney at Law, For Guilford County DSS.

Mr. Lewis Pitts, Attorney at Law, For Juvenile.

Ms. Margaret S. Rowlett, Attorney at Law, For Guardian ad Litem.

JUDGES: Hudson, J.

OPINION BY: Hudson

OPINION

ORDER

Upon consideration of the petition filed on the 11th day of December 2007 by Petitioner (Guilford County DSS) in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to *G.S. 7A-31*, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 24th day of January 2008.
s/ Hudson, J.
For the Court"

No. _____ EIGHTEENTH DISTRICT

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NORTH CAROLINA COURT OF APPEALS

* *

IN THE MATTER OF:	)	
	)	From: N.C. Court of
J. G., (a.k.a. J.M.G.	)	Court of Appeals
and J.M.G.)	)	No. COA06-752

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GUILFORD COUNTY DEPARTMENT OF SOCIAL SERVICES' PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. §7A-31

(Filed , 2007

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No. _____ EIGHTEENTH DISTRICT

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NORTH CAROLINA SUPREME COURT

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IN THE MATTER OF:	)	
	)	From: N.C. Court of
J. G., (a.k.a. J.M.G.	)	Appeals and
J.M.G.)	)	No: COA06-752

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GUILFORD COUNTY DEPARTMENT OF SOCIAL SERVICES' PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. §7A-31

(Filed -, 2007

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

The Petitioner, the Guilford County Department of Social Services, respectfully petitions the Supreme Court of North Carolina, pursuant to N.C.G.S. §7A-31 and Rule 15 of the North Carolina Rules of Appellate Procedure, to certify for discretionary review the 6 November 2007 judgment of the Court of Appeals affirming the 20 December 2005 Order of the district court ordering the Petitioner, who is the representative payee of the juvenile's Social Security benefits, to use a portion of those benefits to pay the current monthly mortgage payments on a Habitat for Humanity house the juvenile inherited from his deceased father, plus Two Thousand and Eight Hundred ($2,800) Dollars

in past due mortgage payments, and an additional One Thousand ($1,000) Dollars for repairs to the house. Petitioner prays this Court to certify this judgment for review, because this case has garnered significant public interest, it involves legal principles of major significance to the jurisprudence of the State, and the decision of the Court of Appeals appears likely to be in conflict with a decision of this Court. In support of this Petition, Petitioner shows the following:

FACTS

The juvenile, J.G., was placed into the legal and physical custody of the Guilford County Department of Social Services on 26 July 2004 as a result of an adjudication of delinquency on two juvenile delinquency petitions. R., p. 42. On 6 September 2005, the Guilford County Department of Social Services filed a petition alleging J.G. was a dependent juvenile pursuant to N.C.G.S. §7B-101(9). R., p. 98—99. Although the district court terminated its delinquency court supervision of J.G. on 29 September 2005, R., p. 110, the district court adjudicated him a dependent juvenile on 5 October 2005 and ordered J.G. to remain in the legal and physical custody of the Guilford County Department of Social Services. R., p. 124-126.

On 2 December 2005, this matter came on for a custody review hearing pursuant to N.C.G.S. §7B-906 and a "Motion of Guardian Ad Litem to Protect the Reasonably Foreseeable Needs of [J.G.] filed on 23 November 2005. R., p. 150. On 20 December 2005, the Honorable Susan E. Bray, District Court Judge presiding, entered an Order directing the Guilford County Department of Social Services to use the juvenile's Social Security benefits to pay the monthly mortgage on a Habitat for Humanity house

the juvenile inherited from his adoptive father, $2,800 in delinquent mortgage payments on this house, and $1,000 toward the cost of repairs to the house. R., p. 150-165.

The Guilford County Department of Social Services filed Notice of Appeal on 21 December 2005. R., p. 166. The transcript of the proceedings was ordered on 22 December 2005, R., p. 167, but on 2 February 2006, the court reporter notified the court that the tapes of the proceedings were inaudible. R., p. 168. On 28 February 2006, the Guilford County Department of Social Services filed a Motion for Extension of Time to Serve Proposed Record on Appeal that was granted on 1 March 2006. R., p. 169-171. The Proposed Record on Appeal was served on 3 April 2006, R., p. 172, and on 4 May 2006, J.G.'s Guardian Ad Litem filed their Notice of Objections to Proposed Record on Appeal. R., p. 173. On 4 April 2006, Petitioner filed a Petition for Writ of Certiorari which this Court dismissed without prejudice on 21 April 2006 to refile after the settled Record on Appeal was filed. On 19 May 2006, the Guilford County Department of Social Services filed and served its Motion to Request Judicial Settlement of Record on Appeal, R., p. 176, and on 22 May 2006, the Guilford County Department of Social Services filed with this Court its Motion to Extend Time to Request Judicial Settlement of Record on Appeal with this Court. R., p. 174-178. On 24 May 2006, this Court granted the Motion to Extend Time to Request Judicial Settlement of Record on Appeal, R., p. 179 and the Record on Appeal was settled by agreement on 25 May 2006. The Record on Appeal was filed in the Court of Appeals on 6 June 2006, docketed on 7 June 2006 and mailed on 9 June 2006.

The juvenile, J.G., at the time of the hearing before the district court was a fifteen-year old juvenile. R., p. 140. Tracy Studivent (hereinafter "Studivent") married J.G.'s biological mother, Willie Edwana Gibson, on 16 August 1991. R., p. 151. The district court terminated the parental rights of J.G.'s biological father, John Couch, R., p. 150, and on 15 December 1992, Studivent adopted J.G. as his son. R., p. 151. J.G.'s biological mother abandoned the family in April 1993, and the district court terminated her parental rights on 14 January 1994, R., p.151. Studivent was diagnosed with cancer in 1992, and he died in 3 February 1994. R., p. 151-52. Studivent left a will devising all of his property, including a Habitat for Humanity house, to a testamentary trust for the benefit of J.G. until he turned eighteen years of age. R., p. 152. As Studivent's legally adopted son, J.G. received Social Security benefits after his death. *Id.* Studivent named Connie Bell as J.G.'s guardian to care for J.G. and to live with J.G. in the Habitat for Humanity house he had purchased before his death. *Id.*

J.G. initially came into DSS custody in 3 October 1997 as a result of an abuse petition filed against his guardian, Connie Bell. R., p.153. As a result of these proceedings, J.G. was placed in foster care with his maternal aunt, Arnita Gibson. *Id.* In March 2003, Ar· ta Gibson, adopted J.G., and she lived with J.G. in the house his adoptive father left for him. R., p.156. J.G.'s adoption terminated his DSS case, and as his adoptive mother, Ms. Gibson became the representative payee of J.G.'s Social Security benefits. *Id.*

On 26 July 2004, J.G. was again placed into DSS custody as a result of the violation of his probation

for an adjudication of delinquency for misdemeanor possession of stolen property, simple assault and second-degree trespass. R., p. 156-57. While J.G. was in DSS custody, his adoptive mother, Arnita Gibson, and her boyfriend, William Gilmer, continued to live in the house left in trust to J.G. R., p. 159. On 28 March 2005, while J.G. was still in the custody of DSS, J.G.'s adoptive mother, Arnita Gibson, relinquished her parental rights to J.G. *Id.* Subsequent to the relinquishment of her parental rights, Arnita Gibson and Willie Gilmer abandoned J.G.'s house and stopped making the mortgage payments. *Id.* When J.G. was placed into DSS custody, DSS became J.G.'s representative payee of his Social Security benefits. *Id.* DSS applied his monthly benefit check in the amount of approximately $538.00 toward the cost of his foster care which was approximately $1,333.00 per month at the time of the hearing before the district court. R., p.161. J.G.'s house remains vacant while he is in foster care, and DSS has no plans to place him in the house while he is in DSS custody. R., p. 159, 164.

At the time this motion was filed, J.G.'s house was valued at approximately $80,000.00. R., p. 160. Habitat for Humanity held the mortgage in the amount of approximately $27,000.00 with monthly payments of $221.00. *Id.* At the hearing, the GAL, Anne Moore, and her supervisor, Amy Townsend, testified that in their opinion, it would be in J.G.'s best interest for DSS to make the monthly mortgage payments on J.G.'s house to preserve it for when he reaches majority age in three years. R., p. 142-143. The Attorney Advocate for the GAL, Lewis Pitts, argued DSS had a fiduciary and federal statutory duty to distribute J.G.'s Social Security benefits for

J.G.'s sole use and benefit. R., p. 145. He argued that the distribution of J.G.'s Social Security benefits had to be prioritized to ensure that the "current and reasonably foreseeable needs of the beneficiary are met." *Id.* He further argued that North Carolina law as well as the Federal Adoption and Safe Families Act required DSS, as legal guardian of the juvenile, to act in J.G.'s best interest. *Id.* The Attorney Advocate argued that DSS failed to distribute the J.G.'s monthly Social Security benefits in a manner so as to keep the mortgage current and up to date. *Id.* He alleged that DSS did not act in J.G.'s best interest, because DSS used all of J.G.'s Social Security benefits to pay for the cost of his foster care, and J.G. had no legal obligation to repay DSS or any other state agency for the care and services he received as a foster child. R., p. 145-46. He further argued that prior to court action, attempts were made by Habitat for Humanity and the GAL to request DSS to make these mortgage payments so that the juvenile would have housing when he aged out of foster care. R. p. 146. No payments were made and foreclosure was being considered. *Id.* He also argued that the district court had jurisdiction under Chapter 7B of the North Carolina General Statutes to ensure DSS used J.G.'s Social Security benefits in his best interests and to order DSS to use those benefits to pay the mortgage on J.G.'s house. *Id.*

DSS's attorney, Lynne G. Schiftan, argued that the district court lacked subject matter jurisdiction under both federal and state law to order DSS, as the representative payee of J.G.'s Social Security benefits, to use these benefits to pay the mortgage on J.G.'s house. *Id.* DSS argued that the Social Security Administration administers Social Security

benefits, and the Social Security regulations allowed DSS, as representative payee, to reimburse itself for the costs of J.G.'s foster care. *Id.* DSS argued it was not a conflict of interest for a department of social services to use a juvenile's Social Security benefits to pay the costs of foster care for the juvenile. R., p. 147-48.

DSS also argued that the Social Security Administration has held that a state court may not direct the disposition of Social Security or SSI benefits paid to a representative payee. *Id.* DSS further argued that even if the state court had jurisdiction, the North Carolina General Statutes as well as North Carolina case law, did not grant the district court this authority. R., p. 149. DSS submitted the North Carolina Supreme Court cases, *In re Wharton, 305 NC 565, 290 S.E. 2d 688 (1982)* and *In re Brownlee, 301 NC 532, 272 S.E. 2d 861 (1981),* supporting its position. *Id.*

The district court found that, "[t]he Department's utilization of [J.G.'s] social security benefits has not been reasonable in that those monies have been used to reimburse the County for [J.G.'s] room and board and not to pay the $221 house payment on [J.G.'s] Habitat house that he will need as a residence when he leaves the group home or foster care." R., p. 164. As a result of this finding and others, the Court ordered DSS use a portion of J.G.'s SSS benefits to pay the monthly mortgage on his home. R, p., 165. The Court further ordered DSS to pay $2,800.00 for the past-due mortgage payments on the house plus an additional $1,000 for repairs to the house. *Id.*

The Court of Appeals held that the district court had subject matter jurisdiction over this case, and that the district court's order requiring the

Petitioner to use a portion of the juvenile's Social Security benefits to pay the monthly mortgage, past due mortgage and repairs on the juvenile's house did not subject the juvenile's Social Security benefits to execution, levy, attachment, garnishment or other legal process in violation of 42 U.S.C. §407(a). The Court of Appeals also did not address the Petitioner's assignment of error that the district court committed reversible error in concluding that the Petitioner was J.G.'s "general guardian" while he was in the Petitioner's legal and physical custody and had a duty to handle J.G.'s property and conserve his estate.

REASONS WHY CERTIFICATION SHOULD ISSUE

I. The Subject Matter of This Appeal Has Significant Public Interest

This case deals with a foster care agency's right, as a representative payee of a juvenile's Social Security benefits, to use those benefits to pay for the juvenile's foster care costs. This case has garnered statewide and national attention, because the issues involve over $100 million dollars in Social Security benefits that are paid to juveniles in foster care throughout the country. Erik Eckholm, *Welfare Agencies Seek Foster Children's Assets*, N.Y. Times, Feb. 17, 2006. As the Court of Appeals stated in its opinion, the Petitioner's actions in using the juvenile's Social Security benefits to pay for his foster care costs "have become a common practice by foster care agencies throughout the country." *In Re J.G.*, 2007 N.C. App. Lexis, 2252(2007). The day after the Court of Appeals rendered its 6 November

2007 opinion, there were articles about the court's decision in the Charlotte Observer, the Greensboro News & Record, and the Raleigh News & Observer. In fact, the Greensboro News & Record has run articles on this case and the issues surrounding it on December 18, 2005, October 20, 2006, January 13, 2007, February 9, 2007, June 19, 2007, July 8, 2007, and November 7, 2007. Likewise the Charlotte Observer has run articles on this case on June 16, 2006, November 2, 2006, February 8, 2007, February 10, 2007, and November 11, 2007. The Raleigh News & Observer also ran articles on May 14, 2006, October 23, 2006 and November 7, 2007. Last, but certainly not least, the New York Times published an article about this case and the issue of "money starved welfare agencies" and children's advocates fighting over the use of over $100 Million Dollars in Social Security benefits on February 17, 2006. This case has even drawn the attention of California Congressman Pete Stark, who has introduced a bill entitled the "Foster Children Self-Support Act" in the United States House of Representatives to limit, if not prevent, foster care agencies from using juveniles' Social Security benefits to pay for their foster care costs.

II. This Appeal Involves Legal Principles of Major Significance to the Jurisprudence of This State.

The Court of Appeals' decision threatens the ability of departments of social services statewide to use a juvenile's Social Security benefits for the current use and maintenance of the juvenile as that term is defined in the 20 C.F.R.404.2040. In Guilford County alone, there were 86 children receiving

Social Security benefits in 2005. As the representative payee of these juveniles' Social Security benefits, the Guilford County Department of Social Services received approximately $400,340 in benefits from January 1, 2005 to December 31, 2005. Of this amount, the Guilford County Department of Social Services used approximately $307,000 on housing and feeding these juveniles. If district courts across the state are allowed to prevent county departments of social services from using these funds to offset the costs of care, where will the additional money needed to provide for the current maintenance expenses of these juveniles come from? It will not come from the state and federal governments, and counties have already been forced to raise taxes and slash expenditures to fund their current budgets. In the case of Guilford County alone, even if district court judges only prohibited the Guilford County Department of Social Services from using a fourth of the juvenile's Social Security benefits to pay for their cost of care, Guilford County would still have to find an additional $100,000 in its budget to feed and house these juveniles.

Additionally, the Court of Appeals' decision now stands for the proposition that county departments of social services are the "general guardians" of the juveniles in their legal and physical custody. N.C.G.S. §35A-1220, however, states specifically that county departments of social services are the "guardians of the person" of the juveniles, and it is not the duty of the guardian of the person to protect the assets of the juvenile, but it is the duty of the general guardian or guardian of the estate. N.C.G.S. §35A-1202(10) and N.C.G.S. §35A-1202(9). The district court appointed a guardian of the estate

for J.G. on 1 March 2005, R.p. 159, and the guardian testified that there was approximately $4,000 Dollars in his estate, but the guardian did not think it was in J.G.'s best interest to use that money to pay the current or delinquent mortgage on his house. The Court of Appeals failed to even consider the responsibility of the guardian of the estate in this situation.

III. The Decision of the Court of Appeals is Likely to Conflict With a Decision of the Supreme Court.

This Court has often stated that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). The Court of Appeals' decision in this case directly conflicts with the decision of a prior panel of the Court of Appeals in *Brevard v. Brevard*, 74 N.C. App. 484, 328 S.E.2d 789 (1985). The *Brevard* panel, citing 42 U.S.C. 407, held that a district court had no power to order a defendant to pay over to the court or to the plaintiff any part of the Social Security benefits he had received, or might receive in the future, as representative payee for the children. Id. at 488, 328 S.E.2d 789, 792 (1985). This was despite the fact that the children were the beneficiaries of the benefits, and the children were living with the plaintiff and not the defendant at the time of the order. The Brevard panel further held:

In enacting Title 42, Chapter 7, Congress provided that the use or misuse of federal Social Security

benefits would be a federal matter, entrusted primarily to the [Social Security Administration]. . . . The SSA is responsible to see that defendant is spending the disability payments for the children's benefit. Plaintiff may have an administrative remedy, through petitioning the SSA to remove defendant as representative payee or to conduct an inquiry into his use of the children's funds. *See* 20 C.F.R. 404.2001 *et seq.; see also* 18 U.S.C. § 641 (which the Social Security Administration might invoke if defendant has misused federal moneys). The courts of North Carolina, however, do not possess the power to compel the Social Security Administration to transfer the children's benefits to someone other than the designated payee, nor do they have the power to determine that defendant is misusing Social Security benefits paid to him on behalf of the children and to direct that he account for them to some other person.

Id. at 488-89, 328 S.E.2d 789, 792 (1985)(emphasis added).

Here the Court of Appeals held that the district court had the power to determine that the Petitioner was misusing the juvenile's Social Security benefits and to direct the Petitioner, as the juvenile's representative payee, to pay over a portion of the amount it received to the juvenile's creditors. Petitioner contends that the 6 November 2007 decision of Court of Appeals essentially overruled the *Brevard* panel of the Court of Appeals.

ISSUES TO BE BRIEFED

In the event the Court allows this Petition for Discretionary Review, the Petitioner intends to present the following issues its brief for review.

I.

II. **DID THE TRIAL COURT HAVE SUBJECT MATTER JURISDICTION TO ORDER THE GUILFORD COUNTY DEPARTMENT OF SOCIAL SERVICES TO USE THE JUVENILE'S FEDERAL SOCIAL SECURITY SURVIVOR'S BENEFITS TO PAY THE REPAIR COSTS AND THE DELINQUENT, CURRENT, AND FUTURE MORTGAGE PAYMENTS ON THE JUVENILE'S HOUSE?**

Assignment of Error No. 2 (R., p. 162)
Assignment of Error No. 4 (R., p. 164)
Assignment of Error No. 5 (R., p. 165)
Assignment of Error No. 6 (R., p. 165)

III. **DID THE TRIAL COURT ERR AS A MATTER OF LAW IN CONCLUDING THAT THE GUILFORD COUNTY DEPARTMENT OF SOCIAL SERVICES IS THE GENERAL GUARDIAN OF A JUVENILE PLACED INTO ITS LEGAL AND PHYSICAL CUSTODY WHEN NO OTHER GUARDIAN HAS BEEN APPOINTED BY THE COURT?**

Assignment of Error No. 3 (R., p. 163-164)

Respectfully submitted this the 10th day of December, 2007.

/s/ Electronically Submitted

James A. Dickens
DSS Attorney

GUILFORD COUNTY DEPT. OF SOCIAL SERVICES
Legal Department
1203 Maple Street
Greensboro, North Carolina 27405
(336) 641-5070 • (336) 641-6868 (facsimile)

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the Petition for Discretionary Review upon all other parties in this cause by depositing a copy hereof, postage prepaid, in the United States mail, addressed as follows:

Lewis Pitts
P.O. Box 2101
Durham, NC 27702

Margaret S. Rowlett
Smith James Rowlett & Cohen
Post Office Box 990
Greensboro, NC 27402

Alexandra S. Gruber
North Carolina
Guardian Ad Litem
Post Office Box 2448
Raleigh, NC 27602

M. Travis Payne
Edelstein & Payne
Post Office Box 28186
Raleigh, NC 27611-8186

Amy L. Keegan
Nelson Mullins Riley Scarborough LLP
4140 Parklake Avenue
Post Office Box 30519
Raleigh, North Carolina 27622-0519

This the 11th day of November, 2007.

/s/ Electronically submitted
James A. Dickens
DSS Attorney

GUILFORD COUNTY DEPT. OF SOCIAL SERVICES, Legal Department
1203 Maple Street
Greensboro, North Carolina 27405
(336) 641-5070 • (336) 641-6868 (facsimile)

IN THE MATTER OF: J.G., (a.k.a. J.M.G. and J.M.S.),

NO. COA06-752

COURT OF APPEALS OF NORTH CAROLINA

652 S.E. 2d 266; 2007 N.C. App. LEXIS 2252

January 25, 2007, Heard in the Court of Appeals
November 6, 2007, Filed

PRIOR HISTORY: [**1]
Guilford County. No. 97 J 697.

DISPOSITION: Affirmed.

COUNSEL: Office of the Guilford County Attorney, by Deputy County Attorney James A. Dickens, for Guilford County Department of Social Services, petitioner-appellant.

Smith, James, Rowlett & Cohen, L.L.P., by Margaret Rowlett, for Guardian ad Litem; and Legal Aid of N.C., by Attorney Advocate Lewis Pitts, for respondent-juvenile-appellee.

Nelson Mullins Riley & Scarborough LLP, by Matthew P. McGuire and Amy L. Keegan, for North Carolina Justice Center, Carolina Legal Assistance, and the Pulpit Forum of Clergy, Greensboro and Vicinity; and Charm M. Nichol, for Governor's Advocacy Council for Persons with Disabilities, Amici Curiae

Edelstein & Payne, by M. Travis Payne; and Sullivan & Worcester LLP, by Patrick P. Dinardo, Beth Jacobson, and Jennifer L. Sullivan, for First Star, Amicus Curiae.

Paul Meyer, for North Carolina Association of County Commissioners, Amicus Curiae.

JUDGES: JACKSON, Judge. Judges CALABRIA and GEER concur.

OPINION BY: JACKSON

OPINION

[*267] Appeal by petitioner from order entered 20 December 2005 by Judge Susan E. Bray in Guilford County District Court. Heard in the Court of Appeals 25 January 2007.

JACKSON, Judge.

John C. ("the biological father") and Willie G. ("the biological [**2] mother") are the parents of the minor child J.G., who was born on 9 July 1990. The trial court terminated the biological father's parental rights to J.G., and the biological mother subsequently married Tracy S. ("Tracy") on 16 August 1991. On 15 December 1992, Tracy adopted J.G. as his son, and a week later, the biological mother and Tracy purchased a house from Habitat for Humanity ("the Habitat home").

In April 1993, the biological mother abandoned Tracy and J.G., and on 27 August 1993, Tracy executed a will in which he devised all of his property -- including the Habitat home -- to a testamentary trust for J.G. Tracy also appointed his

girlfriend, Connie Bell ("Bell"), as J.G.'s guardian and Dawson Deese ("Deese"), his uncle, as executor and trustee, with Bell as an alternate executrix and trustee.

On 5 November 1993, Tracy was granted both a divorce from bed and board from the biological mother and sole and exclusive permanent custody of J.G. The biological mother was divested of all rights in the Habitat home and was denied any visitation rights with J.G. On 14 January 1994, the trial court terminated the biological mother's parental rights. On 3 February 1994, Tracy died.

On 18 [**3] March 1994, Bell was appointed J.G.'s general guardian. As Tracy's legally adopted son, J.G. received Social Security benefits after Tracy's death, and Bell was responsible for accounting for the Social Security checks, making the payments on the mortgage on the Habitat home ("the Habitat mortgage"), and taking care of the Habitat home. On 5 December 1994, Habitat for Humanity notified Bell, Deese, and the Clerk of the Guilford County Superior Court that Bell was delinquent in making the mortgage payments. On 17 January 1995, J.G.'s maternal uncle, George Jennings ("Jennings"), filed a petition to remove Bell as J.G.'s guardian, alleging that Bell had appropriated J.G.'s Social Security benefits to her own use. [*268] On 7 February 1995, Bell and Jennings entered into a consent order that provided for: (1) J.G. to continue residing with Bell; (2) Deese to be the payee for the Social Security benefits; and (3) Deese to make the mortgage payments to Habitat for Humanity.

On 3 October 1997, the Guilford County Department of Social Services ("DSS") filed a

petition to remove J.G. from Bell's custody, alleging that Bell neglected J.G. and used improper physical discipline on him. J.G. told an employee [**4] of the Child Evaluation Clinic that Bell drank and abused him on a daily basis, whipping him with a belt, a coat hanger, and various other items. On 17 December 1997, the trial court adjudicated J.G. as neglected. The guardian *ad litem* did not agree to a reunification plan with Bell, and the trial court ordered J.G. to remain in the legal and physical custody of DSS pending further investigation.

On 6 February 1998, the guardian *ad litem* reported to the trial court that, notwithstanding Deese's appointment as J.G.'s general guardian, Bell had resumed converting J.G.'s Social Security benefits to her own use as of the spring of 1997 and that no payments had been made on the Habitat mortgage since May 1997. The guardian *ad litem* recommended placing J.G. with a relative that was willing and able to assume custody of J.G. and reside at the Habitat home.

On 6 February 1998, the trial court ordered that DSS had the authority to place J.G. in the physical custody of his maternal aunt, Arnita Gibson ("Gibson"), and Gibson later informed DSS that she wanted to adopt J.G. Deese, meanwhile, died on 18 October 1998. On 14 May 1999, a social worker reported that J.G., who was in second grade at the [**5] time, was exhibiting behavioral problems at school, and on 9 February 2001, DSS again reported that J.G. was exhibiting behavioral problems at home and at school. On 3 August 2001, DSS reported that J.G. was doing better in school, both behaviorally and academically. During the time J.G.

was in DSS custody, DSS paid the mortgage on the Habitat home where Gibson and J.G. resided.

On 18 March 2003, Gibson adopted J.G. and court supervision ceased. Thereafter, Gibson became the representative payee for J.G.'s Social Security benefits, which totaled approximately $ 571.00 per month. Gibson also received an adoption subsidy of approximately $ 500.00 per month. The monthly payment on the Habitat mortgage was approximately $ 221.00.

On 11 December 2003, J.G. was adjudicated delinquent for one count of misdemeanor stolen property, one count of simple assault, and one count of second-degree trespass. On 1 March 2004, the trial court placed J.G. on probation for twelve months. On 20 April 2004, Gibson filed a juvenile petition stating that J.G. ran away from home for a period of more than twenty-four hours. On 22 April 2004, a motion for review was filed after J.G. violated the terms of his probation. [**6] The court appointed a guardian *ad litem* on 26 April 2004 and ordered DSS to determine whether a dependency petition should be filed on J.G.'s behalf. On 20 May 2004, J.G. was placed in a group home, and on 27 May 2004, the guardian *ad litem* reported that J.G. did not wish to return to his adoptive mother's home. Specifically, J.G. stated that (1) his aunt put him out on the front porch every morning at 4:00 a.m.; (2) he did not have clothes that fit him; (3) he did not get along with his aunt's boyfriend; and (4) he believed that his aunt only wanted his money. The guardian *ad litem* also reported that J.G. was concerned both about the condition of the Habitat home and that it could be taken away as a result of delinquent mortgage payments.

On 26 July 2004, J.G. again was placed into DSS custody, and the trial court ordered DSS to investigate the status of J.G.'s estate and the best way to preserve it for him. While J.G. was in DSS custody, Gibson and her boyfriend continued to live in the Habitat home. On 28 March 2005, while J.G. still was in the custody of DSS, Gibson relinquished her parental rights to J.G. Thereafter, Gibson and her boyfriend abandoned the Habitat home, which fell [**7] into a state of disrepair and was vandalized.

On 5 October 2005, the trial court adjudicated J.G. dependent and ordered that he remain in the legal and physical custody of DSS. Thereafter, DSS became the representative [*269] payee of J.G.'s Social Security benefits. DSS made no payments toward the Habitat mortgage. Instead, DSS applied those funds, which amounted to approximately $ 538.00 per month, toward the cost of J.G.'s foster care, which amounted to approximately $ 1,300.00 per month for room and board at a therapeutic foster home. In 2005, the Habitat home was valued at approximately $ 80,000.00, and Habitat for Humanity held the outstanding mortgage of approximately $ 27,000.00. Because the mortgage was not being paid, Habitat for Humanity initiated foreclosure proceedings.

On 23 November 2005, the guardian *ad litem* filed a motion to protect J.G.'s reasonably foreseeable needs. By order filed 20 December 2005, the trial court found that DSS's use of J.G.'s Social Security benefits to reimburse itself, rather than make the $ 221.00 monthly Habitat mortgage payment, had not been reasonable. The court reasoned that J.G. will need the Habitat home as a

residence when he turns eighteen [**8] years old and ages out of the foster care system. The court ordered DSS to use a portion of J.G.'s Social Security benefits to pay: (1) the monthly mortgage on his home; (2) $ 2,800.00 for the past-due mortgage payments on the house; [1] and (3) $ 1,000.00 for repairs to the house. On 21 December 2005, DSS filed notice of appeal.

> 1 Since no mortgage payment was made since January 2005, the past-due amount of $ 2,800.00 accumulated while J.G. was in DSS custody.

Preliminarily, we note that both parties agree that the 20 December 2005 order from which DSS appeals is an interlocutory order. They disagree, however, as to whether the "substantial right" exception applies in the instant case.

"'An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.'" *Davis v. Davis, 360 N.C. 518, 524, 631 S.E.2d 114, 119 (2006)* (quoting *Veazey v. City of Durham, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950))*. "Generally, a party cannot immediately appeal from an interlocutory order unless failure to grant immediate review would 'affect[] a substantial right' [**9] pursuant to [*North Carolina General Statutes,] sections 1-277* and *7A-27(d)*." *Id. at 524, 631 S.E.2d at 119*. "The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order." *Embler v. Embler, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001)*.

"The 'substantial right' test for appealability of interlocutory orders is that 'the right itself must be substantial and the deprivation of that . . . right must potentially work injury . . . if not corrected before appeal from final judgment.'" *Frost v. Mazda Motor of Am., Inc., 353 N.C. 188, 192-93, 540 S.E.2d 324, 327 (2000)* (quoting *Goldston v. Am. Motors Corp., 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990)).* Our Supreme Court has "adopted the dictionary definition of 'substantial right': 'a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right.'" *Sharpe v. Worland, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999)* (alteration in original) (quoting *Oestreicher v. Am. Nat'l Stores, Inc., 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976)).*

Here, [**10] the right is one of substance as opposed to form. First, the trial court's order required DSS to pay (1) $ 2,800.00 to Habitat for Humanity to bring the Habitat mortgage to current status and (2) $ 1,000.00 toward repairs of the Habitat home. Although this Court has held that an injunction on the use of funds may not rise to the level of a substantial right, *see Guy v. Guy, 27 N.C. App. 343, 348, 219 S.E.2d 291, 295 (1975)*, a substantial right *may* be affected when a trial court orders the immediate payment of funds. *See, e.g., Harrell v. Harrell, 253 N.C. 758, 761, 117 S.E.2d 728, 731 (1961); Miller v. Henderson, 71 N.C. App. 366, 368, 322 S.E.2d 594, 596 (1984); see also State ex rel. Comm'r of Ins. v. N.C. Rate Bureau, 102 N.C. App. 809, 811-12,* [*270] *403 S.E.2d 597, 599 (1991)* (holding that an order denying the release of funds held in escrow, as opposed to an order "purport[ing]

to determine who is entitled to the money," is interlocutory and does not affect a substantial right). However, this Court also has held that "no substantial right exists . . . [w]hen the *sole issue* is the payment of money pending the litigation." *Perry v. N.C. Dep't of Corr., 176 N.C. App. 123, 130, 625 S.E.2d 790, 795 (2006)* [**11] (emphasis added). Nevertheless, the instant case affects more than just money; it also affects DSS's right to choose how to dispose of funds that it receives in its capacity as a representative payee properly designated by the Social Security Administration. Its right to use its discretion as representative payee is "a matter of substance as distinguished from [a] matter[] of form." *Oestreicher, 290 N.C. at 130, 225 S.E.2d at 805.* Accordingly, the trial court's order affects a substantial right.

After determining that the trial court's order affects a substantial right, we next must determine whether that right will be "lost absent immediate review." *McCutchen v. McCutchen, 360 N.C. 280, 282, 624 S.E.2d 620, 623 (2006).* In the case *sub judice*, the substantial right at issue will be lost if the trial court's order is not immediately reviewed. As DSS correctly contends in its brief, "[i]f DSS is not allowed to appeal until after the juvenile reaches majority age, DSS will never be able to recover the funds it was . . . required to pay pursuant to the Order." Specifically, DSS accurately notes that it "cannot sue the juvenile, because . . . he is not legally responsible for his own foster [**12] care costs. Neither can DSS sue the Guardian *Ad Litem*, because he or she only represents the juvenile and has not spent the money for its own purposes." Accordingly, as the trial court's 20 December 2005 order affects a substantial right that will be lost if

not reviewed before final judgment, the instant appeal is properly before this Court.

On appeal, DSS contends that the trial court: (1) lacked authority to order DSS to use J.G.'s Social Security benefits to pay the repair costs as well as the delinquent, current, and future mortgage payments on the Habitat home; (2) erred in concluding that DSS is the general guardian of J.G.; and (3) erred in its finding of fact speculating on the impact that might have resulted if both Gibson had been promptly served with the child support complaint and the court had been informed that she was receiving a $ 500.00 adoption subsidy for J.G., on the grounds that this finding was not supported by competent evidence in the record.

As a preliminary matter, we agree with the guardian *ad litem* that a resolution of DSS's second and third arguments is not necessary for a resolution of the instant appeal. Notwithstanding the trial court's finding that DSS [**13] functioned as J.G.'s general guardian and that, had DSS acted more diligently, Gibson may have been ordered to pay her adoption subsidy money toward J.G.'s cost of care, the trial court nevertheless ordered DSS in its capacity as J.G.'s representative payee to make payments on the Habitat mortgage on J.G.'s behalf. Specifically, the trial court " ordered that the Guilford County Department of Social Services is to use funds from [J.G.]'s social security benefits, *for which the Department is representative payee*, to pay the monthly mortgage on [J.G.]'s Habitat house . . . ." (Emphasis added). The pivotal issue on appeal is not whether the trial court erred in its findings with respect to guardianship or Gibson's adoption subsidy, but rather whether the trial court properly

ordered DSS, as the representative payee of J.G.'s Social Security benefits, to make the payments on J.G.'s Habitat mortgage. Because a resolution of DSS's second and third arguments is not necessary for our resolution of the appeal, we decline to reach those issues. *See, e.g., Champs Convenience Stores, Inc. v. United Chem. Co., Inc., 329 N.C. 446, 452, 406 S.E.2d 856, 859 (1991); State ex rel. Utils. Comm'n. v. S. Bell Tel. & Tel. Co., 326 N.C. 522, 528, 391 S.E.2d 487, 490 (1990).*

First, [**14] DSS contends that because federal law governs Social Security benefits, North Carolina state courts are preempted and therefore lack subject matter jurisdiction to enter orders affecting such benefits. We disagree.

[*271] "Federal preemption occurs when the federal government's regulation in an area is comprehensive. State action may be barred upon a showing of congressional intent to occupy the field and prohibit parallel state action." *Hatcher v. Harrah's N.C. Casino Co., L.L.C., 151 N.C. App. 275, 278, 565 S.E.2d 241, 243 (2002)* (internal quotation marks and citations omitted). However, as the United States Supreme Court has explained,

> [w]e start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule.

Charles Dowd Box Co., Inc. v. Courtney, 368 U.S. 502, 507-08, 82 S. Ct. 519, 7 L. Ed. 2d 483, 487 (1962).

Title 42 of the United States Code, as well as the regulations promulgated thereunder by the Social Security Administration, [**15] governs Social Security benefits. *See 42 U.S.C. §§ 401 et seq.; 20 C.F.R. §§ 401.5 et seq.* Pursuant to *Title 42, section 405*, "misuse of benefits by a representative payee occurs in any case in which the representative payee receives payment under this title for the use and benefit of another person and converts such payment, or any part thereof, to a use other than for the use and benefit of such other person." *42 U.S.C. § 405(j)(9).* The statute further provides that "[t]he Commissioner of Social Security may prescribe by regulation the meaning of the term 'use and benefit' for purposes of this paragraph." *Id.* The Social Security regulations, in turn, state that "payments . . . to a representative payee have been used for the use and benefit of the beneficiary if they are used for the beneficiary's current maintenance. Current maintenance includes cost[s] incurred in obtaining food, shelter, clothing, medical care, and personal comfort items." *20 C.F.R. §§ 404.2040, 416.640.*

In the instant case, DSS has been appointed representative payee of J.G.'s Social Security payments, and in that capacity, DSS has reimbursed itself for the cost of J.G.'s foster care. As such, DSS contends that [**16] it is using, and always has used, J.G.'s Social Security benefits for his "current maintenance" as defined by the federal regulations.

Notwithstanding mixed reviews, [2] DSS's actions in the instant case have become a common practice by foster care agencies throughout the country:

> As a part of revenue maximization strategies . . ., foster care agencies are engaged in the systemic practice of converting foster children's Social Security benefits into a source of state funds. The agencies identify foster children who are disabled or have deceased or disabled parents, apply for Social Security benefits on the children's behalf, and then take the children's benefits to reimburse foster care costs for which the children have no legal obligation. The states are using the Social Security benefits as a funding stream in order to reduce state expenditures rather than as a resource to address the children's unmet needs in the severely broken foster care system. Furthermore, the benefits are not being conserved to aid the children in their forthcoming and difficult transitions from foster care to independence.

Daniel L. Hatcher, *Foster Children Paying for Foster Care, 27 Cardozo L. Rev. 1797, 1798-99 (2006)* [**17] (footnotes omitted). Nevertheless, the United States Supreme Court upheld such a practice in *Washington State Dep't of Social & Health Services v. Guardianship* [*272] *Estate of Keffeler, 537 U.S. 371, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003).* Specifically, the *Keffeler* Court addressed whether a

foster care agency's practice of reimbursing itself violated the anti-alienability provision in the Social Security Act. *See Keffeler, 537 U.S. at 375, 154 L. Ed. 2d at 979* ("The question here is whether the State's use of Social Security benefits to reimburse itself for some of its initial expenditures violates a provision of the Social Security Act protecting benefits from 'execution, levy, attachment, garnishment, or other legal process.' We hold that it does not." (internal citations omitted)). The issue in *Keffeler* was narrow, however, [3] and *Keffeler* alone does not support DSS's preemption argument.

2 *See, e.g.*, Patrick Gardner, Keffeler v. DSHS: *Picking the Pockets of America's Neediest Children*, Youth L. News, July-Sept. 2002; Lorraine Ahearn, *At Eleventh Hour, Judge Saves Boy in Foreclosure*, Greensboro News & Rec., Dec. 18, 2005 (describing J.G.'s situation as "a story of uncommon cruelty, compounded by layer [**18] upon layer of bureaucratic incompetence. And finally, no remorse from the only parent the boy, at age 15, has left -- the Department of Social Services."). *But see* Tobias J. Kammer, Note, Keffeler v. Department of Social and Health Services: *How the Supreme Court of Washington Mistook Caring for Children as Robbing Them Blind, 77 Wash. L. Rev. 877, 878 (2002)* (arguing that social services entities "will not apply to act as representative payee if not permitted to use benefits for the child's current maintenance due to the application expenses").

3 We note that there may be viable constitutional objections to the practice employed by DSS in the instant case and used

by similar state agencies throughout the country. *See generally Hatcher, supra, at 1832-41* (discussing possible objections based upon procedural due process, equal protection, and the Takings Clause). The *Keffeler* Court acknowledged the existence of a procedural due process claim but declined to rule upon the issue. *See Keffeler, 537 U.S. at 380 n.4, 154 L. Ed. 2d at 982* (declining to reach the issue because the Washington Supreme Court did not reach the argument, "accepted in the alternative by the trial court, that the [**19] department violated procedural due process by failing to provide notice of the 'intended result' of its appointment as representative payee"). However, because such constitutional arguments were not raised at trial, we do not pass upon them on appeal. *See State v. Deese, 136 N.C. App. 413, 420, 524 S.E.2d 381, 386* (holding that this Court will not consider constitutional arguments neither asserted nor determined in the trial court), *appeal dismissed and disc. rev. denied, 351 N.C. 476, 543 S.E.2d 499 (2000).*

Although this Court has held that a trial court does not have jurisdiction to direct the Social Security Administration to make payments to someone other than the beneficiary or representative payee, *see Brevard v. Brevard, 74 N.C. App. 484, 488, 328 S.E.2d 789, 792 (1985),* [4] we note that "[t]he SSA [Social Security Administration] does not resolve disputes between a payee and a beneficiary concerning the use of benefits." *Jahnke v. Jahnke, 526 N.W.2d 159, 163 (Iowa 1994).* As a result, several courts have held that state courts have concurrent jurisdiction to hear disputes between a

representative payee and a beneficiary concerning the use of Social Security funds. *See, e.g., id.* [**20] ("Although the federal government may prosecute a payee who converts a beneficiary's funds, there is no federal mechanism to prevent such a conversion from occurring. Moreover, once the SSA pays the benefits to the proper representative payee, it has no liability to the beneficiary for misuse of the payments."); *Ecolono v. Div. of Reimbursements, 137 Md. App. 639, 769 A.2d 296, 305 (Md. Ct. App. 2001)* ("[W]e find nothing in federal law to indicate an intent by Congress to limit interested parties to the federal administrative and judicial review process and to prohibit State courts from exercising jurisdiction, in the case before us, when the relief requested is not the removal of the payee but a reallocation of the benefits."); *In re Kummer, 93 A.D.2d 135, 159, 461 N.Y.S.2d 845 (N.Y. App. Div. 1983)* ("[T]he Federal Government has no interest in the funds properly paid to the DSS and it has no power to inquire into their expenditure other than to ascertain whether to make future payments to the DSS as representative payee. It lacks the power to determine disputes between the representative payee and the beneficiary as to the propriety of expenditures of benefits held in trust by the former because it has no interest [**21] in those funds." (footnotes omitted)); *Catlett v. Catlett, 55 Ohio App. 3d 1, 561 N.E.2d 948,* [*273] *953 (Ohio Ct. App. 1988)* ("We find that the case at bar involves an issue, *i.e.*, the representative payee's expenditure of benefits, which is neither an initial determination nor a determination which is not an initial determination as defined by the federal regulations. Jurisdiction over this particular issue has not been exclusively granted to the federal courts by express

provision."). *But see Deweese v. Crawford, 520 S.W.2d 522, 526 (Tex. Ct. App. 1975)* (holding that any dispute between parents and payee as to use of dependent's Social Security benefits must be resolved through federal administrative process), *overruled on other grounds by Cherne Indus., Inc. v. Magallanes, 763 S.W.2d 768, 772 (Tex. 1989).*

4 Although the *Brevard* Court also held that the trial court had no jurisdiction to order the representative payee, who was the father of the beneficiaries, to pay over to the mother of the beneficiaries any part of the Social Security benefits he received as representative payee, the holding was based upon *Title 42, section 407(a) of the United States Code. See Brevard, 74 N.C. App. at 487-88, 328 S.E.2d at 792* [**22] (citing *42 U.S.C. § 407(a)*). As discussed *infra*, however, *section 407(a)* applies only to actions brought by claimants or creditors. In *Brevard*, the action was brought by the mother for an accounting of the Social Security benefits, based upon a prior trial court order directing the father to send the children's Social Security checks to the mother as child support. *See id. at 486, 328 S.E.2d at 791.* The case *sub judice* is distinguishable as the action was brought by the guardian *ad litem* and not a claimant to the Social Security benefits. Therefore, the trial court here, unlike the court in *Brevard*, did not violate *section 407(a).*

In *Jahnke v. Jahnke*, the Iowa Supreme Court, in determining that the state court possessed concurrent jurisdiction in a dispute between a representative payee and an adoptive parent of the beneficiary, noted that "[t]he assumption of state

court jurisdiction is based in part on the *state's interest in the welfare of children residing within its borders.*" *Jahnke, 526 N.W.2d at 163* (emphasis added). Similarly, in the instant case, the guardian *ad litem*, acting on behalf of J.G., disputed DSS's use of J.G.'s Social Security funds, and the trial court found that [**23] DSS's use of the funds was not in J.G.'s best interests. Under our Juvenile Code,

> [t]he duties of the guardian ad litem program shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; . . . to report to the court when the needs of the juvenile are not being met; and to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court.

N.C. Gen. Stat. § 7B-601 (2005). Additionally, "[i]t is the duty of the court to give each child before it such *attention, control and oversight* as is in the best interest of the child and the state." *In re Cusson, 43 N.C. App. 333, 337, 258 S.E.2d 858, 860 (1979)* (emphasis added) (citing *In re Eldridge, 9 N.C. App. 723, 724, 177 S.E.2d 313, 313 (1970)).* Here, both the guardian *ad litem* and the trial court acted consistently with their supervisory roles in seeing to J.G.'s best interests, and J.G.'s best interests were central to the court's order, which noted that if Habitat for Humanity foreclosed on the Habitat home, J.G. would receive very little money from the sale and would be homeless when [**24] he aged out

of foster care. *See generally* Michele Benedetto, *An Ounce of Prevention: A Foster Youth's Substantive Due Process Right to Proper Preparation for Emancipation, 9 U.C. Davis J. Juv. L. & Pol'y 381, 386-89 (2005)* (discussing the troubling prevalence of homelessness among former foster care youth). Although DSS implies that it is always proper for it to reimburse itself for the cost of J.G.'s care using J.G.'s Social Security funds, even the Department of Social and Health Services in *Keffeler* acknowledged that it was not always appropriate to use all of a juvenile's Social Security funds to reimburse itself, in particular in anticipation of "impending emancipation." *Keffeler, 537 U.S. at 378-79, 154 L. Ed. 2d at 981-82* ("The department occasionally departs from this practice, . . . [a]nd there have . . . been exceptional instances in which the department has foregone reimbursement for foster care to conserve a child's resources for expenses anticipated on impending emancipation.").

In accordance with the greater weight of authority, "[w]e agree with those courts that allow state courts to look into the expenditure of dependent social security benefits when an interested party [**25] questions the propriety of those expenditures." *Jahnke, 526 N.W.2d at 163.* Further, the trial court properly exercised jurisdiction as part of its supervisory role over J.G., a "child subject to its jurisdiction." *Eldridge, 9 N.C. App. at 724, 177 S.E.2d at 313.* Accordingly, DSS's assignment of error with respect to subject matter jurisdiction is overruled.

DSS next contends that the trial court's order violated the anti-alienability provision of the Social

Security Act, codified at *section 407(a) of Title 42 of the United States Code.* We disagree.

"In general, Social Security benefits are neither assignable nor subject to legal process." *Brevard, 74 N.C. App. at 487, 328 S.E.2d at 791* (citing *42 U.S.C. § 407* and [*274] *Philpott v. Essex County Welfare Bd., 409 U.S. 413, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973)).* Specifically,

> [t]he right of any person to any future payment under this title [*42 U.S.C. §§ 401 et seq.*] shall not be transferable or assignable, at law or in equity, and *none of the moneys paid or payable* or rights existing under this title *shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.*

42 U.S.C. § 407(a) [**26] (emphases added). In the instant case, DSS contends that by entering the order directing DSS to make J.G.'s mortgage payments, the trial court subjected J.G.'s Social Security benefits to "legal process" in violation of *Title 42, section 407(a) of the United States Code.*

In *Keffeler*, the United States Supreme Court declined to provide a comprehensive definition of "other legal process" but explained that

> "other legal process" should be understood to be process much like the processes of execution, levy, attachment, and garnishment, and at a minimum, would seem to require utilization of some

> judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability.

Keffeler, 537 U.S. at 385, 154 L. Ed. 2d at 985. Using the guidance set forth by the Supreme Court in *Keffeler*, we must determine whether the trial court's 20 December 2005 order constitutes "other legal process" with respect to the alienation of J.G.'s Social Security benefits.

In interpreting *section 407(a)*, we first note that legislative intent controls the construction [**27] of a statute. *See Fid. & Deposit Co. v. Arenz, 290 U.S. 66, 69, 54 S. Ct. 16, 78 L. Ed. 176, 178 (1933).* As our Supreme Court has explained, "in ascertaining this [legislative] intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish." *Shelton v. Morehead Mem'l Hosp., 318 N.C. 76, 81-82, 347 S.E.2d 824, 828 (1986).*

Although DSS in the case *sub judice* contends that the trial court's order directing DSS to make payments on the Habitat mortgage constitutes "legal process" and violates *section 407(a)*, DSS's "interpretation of *42 U.S.C. § 407* takes the statute out of context and is an improper attempt to fashion a shield into a sword to be used against the intended beneficiary of the law." *In re French, 20 B.R. 155, 156 (Bankr. D. Or. 1982).* It is well-settled that "Congress in enacting *42 U.S.C. § 407* sought to protect Social Security payments which benefit the

poor and needy from seizure in legal process against the beneficiaries. *Section 407* deals with the rights of social security recipients and seeks to protect their benefits from the reach of creditors." *In re Greene, 27 B.R. 462, 464 (Bankr. E.D. Va. 1983)* [**28] (internal citation omitted); *see also Lee v. Schweiker, 739 F.2d 870, 874 (3d Cir. 1984)* (noting that the purpose underlying *section 407(a)* "is to protect recipients from losing benefits to creditors"). As such, several state courts have discussed *section 407(a)* as a limitation upon creditors' rights, *see, e.g., In re Estate of Vary, 401 Mich. 340, 258 N.W.2d 11, 17-18 (Mich. 1977), cert. denied sub nom., Ivy v. Mich. Dep't of Treasury, 434 U.S. 1087, 98 S. Ct. 1283, 55 L. Ed. 2d 793 (1978); First Nat'l Bank & Trust Co. v. Arles, 1991 OK 78, 816 P.2d 537, 539 (Okla. 1991)*, and "[c]ourts have uniformly recognized that the purpose of *section 407(a)* is to protect social security beneficiaries and their dependents from the *claims of creditors*." *Fetterusso v. New York, 898 F.2d 322, 327 (2d Cir. 1990)* (emphasis added) (citations omitted). Indeed, the anti-alienability provision "speaks throughout in terms of the rights of social security *recipients* . . . and the protection of their *benefits* from *the reach of creditors*." *Rowan v. Morgan, 747 F.2d 1052, 1055 (6th Cir. 1984)* (third emphasis added) (quoting *Neavear v. Schweiker, 674 F.2d 1201, 1205 (7th Cir. 1982))*. We note, however, that "'*[Section] 407* does not refer to any "claim [**29] of creditors"; it imposes a broad bar against the use of any legal process to reach all Social Security benefits.'" *Keffeler, 537 U.S. at 382, 154 L. Ed. 2d at 985* (quoting *Philpott,* [*275] *409 U.S. at 417, 34 L. Ed. 2d at 611-12*). Nevertheless, the focus of *section 407(a)* is to protect Social Security beneficiaries

against *claimants* to Social Security benefits, whether or not such claimants are creditors. *See Philpott, 409 U.S. at 417, 34 L. Ed. 2d at 612* (noting that *section 407* "is broad enough to include all claimants, including a State"). The congressional intent that *section 407(a)* protect Social Security beneficiaries against actions brought against them is reflected further in the House Conference Report on the Supplemental Security Income legislation:

> "[I]f the benefits which would be provided under this program are to meet the most basic needs of the poor, the benefits must be protected from seizure in *legal processes against the beneficiary.* Therefore, any amounts paid or payable under this program would not be subject to levy, garnishment, or other legal process, except the collection of delinquent Federal taxes. Also, entitlement to these benefits would not be transferable or [**30] assignable."

Kerlinsky v. Commonwealth, 17 Mass. App. Ct. 501, 459 N.E.2d 1240, 1241-42 (Mass. App. Ct. 1984) (quoting 1972 U.S.C.C.A.N. 5142) (emphasis added)). Therefore, we hold that the anti-alienability provision functions as a bar against actions for Social Security benefits brought against Social Security beneficiaries and payees. *See Metz v. Metz, 120 Nev. 786, 101 P.3d 779, 784 (Nev. 2004)* ("Under *42 U.S.C. § 407*, Congress has expressly exempted all Social Security benefits from legal process *brought by any creditor*, including attachment, garnishment, levy or execution . . . ." (emphasis

added)); *see also Commonwealth ex rel. Morris v. Morris, 984 S.W.2d 840, 841, 45 12 Ky. L. Summary 19 (Ky. 1998)* ("The patent intent of this statute is to *prohibit creditors from asserting claims* upon SSI funds that take precedence over the SSI recipient's rights to such funds." (emphasis added)).

This holding comports with the statutory language as well as the Supreme Court's decision in *Keffeler*. The statute provides that Social Security funds "shall [not] be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." *42 U.S.C. § 407(a)*. The *Keffeler* Court further noted that "'other [**31] legal process' should be understood to be process much like the processes of execution, levy, attachment, and garnishment." *Keffeler, 537 U.S. at 385, 154 L. Ed. 2d at 985.* "These legal terms of art refer to formal procedures by which one person gains a degree of control over property otherwise subject to the control of another, and generally involve some form of judicial authorization." *Id. at 383, 154 L. Ed. 2d at 984.* In the instant case, no other person or entity gained control over J.G.'s funds; DSS continued, as representative payee, to control the funds, but merely was directed by the court in its supervisory role to use a portion of the funds to keep J.G.'s mortgage current -- an action intended for the direct benefit of J.G.

Furthermore, the actions listed in *section 407(a)* typically are brought by creditors or other claimants. *See, e.g., Black's Law Dictionary* 609 (8th ed. 2004) (defining "execution" as the "[j]udicial enforcement of a money judgment, [usually] by seizing and selling the judgment debtor's property"); *id.* at 926 (defining

"levy" as the taking or seizing of "property in execution of a judgment" and providing as an example the phrase, "the judgment creditor may [**32] levy on the debtor's assets"); *id.* at 136 (defining "attachment" as a "the seizing of a person's property to secure a judgment or to be sold in satisfaction of a judgment"); *id.* at 702 (defining "garnishment" as "[a] judicial proceeding in which a creditor (or potential creditor) asks the court to order a third party who is indebted to or is bailee for the debtor to turn over to the creditor any of the debtor's property (such as wages or bank accounts) held by that third party"). [5] Here, there is no creditor, nor is there any claimant.

> 5 *See Keffeler, 537 U.S. at 383, 154 L. Ed. 2d at 984-85* (using legal dictionary definitions for "garnishment" and "attachment").

In the case *sub judice*, the guardian *ad litem* filed a motion to protect J.G.'s reasonably foreseeable needs, and based upon this motion, the trial court entered its order directing DSS, *inter alia*, to use a portion of [*276] J.G.'s Social Security benefits to keep current the mortgage on the Habitat home. As discussed *supra*, the legislative intent underlying *section 407(a)* is to protect Social Security beneficiaries from actions brought by creditors or other claimants. Such was not the case here, and therefore, *section 407(a)* is inapplicable. [**33] [6] Accordingly, DSS's assignment of error is overruled.

> 6 Several courts have explained that because *section 407(a)* functions as a protection for Social Security beneficiaries, beneficiaries may waive that statutory protection. *See, e.g., In re Gillespie, 41 B.R. 810, 812 (Bankr. D. Colo.*

1984) (noting that a debtor may waive the protections afforded him by *section 407(a)*); *Matavich v. Budak, 4 Ohio App. 3d 228, 4 Ohio B. 419, 447 N.E.2d 1311, 1312-13 (Ohio Ct. App. 1982)* (same). Because we hold that *section 407(a)* does not apply, we need not decide whether *section 407(a)* may be waived.

Affirmed.

Judges CALABRIA and GEER concur.

PR 07211.025 Michigan
A. PR 05-103 SSI-Michigan-Court Order for the Payment of Funds by Jerome S. P~ to Deanna Stout P~: SSN ~ -REPLY Our reference number: 03-P-036
DATE: May 8, 2003
1. SYLLABUS
The Court cannot re-direct children's past-due benefits. The representative payee is required to use and distribute the benefit payments consistent with the Social Security Act and regulations.
2. OPINION
You asked whether the Agency should take any legal action regarding a state court order that requires Jerome S. P~ to pay funds to his ex-wife Deanna Stout P~. Mr. P~ explained to the Agency that these are retroactive funds he received as representative payee for their three children. This retroactive payment covers a time period when the children were in the custody of their mother. The court order directed a total payment of $2,553 (presumably the amount of the retroactive payment) to Ms. P~. We conclude that the Agency is not a party to the court order and does not need to take any legal action with respect to the order. Regardless of the court order, Mr. P~ is required to use and distribute the benefit payments consistent with the Social Security Act and regulations. In this case, Mr. P~'s compliance with the court order is, in our opinion, not necessarily inconsistent with his responsibilities as a representative payee. However, we advise informing Mr. P~ and the court of Mr. P~'s obligations with respect to these benefits and the circumstances under which he may be permitted to pay them to Ms. P~.
BACKGROUND

As we understand the facts, Ms. P~ was notified by the Agency that all retroactive payments for the three children would be sent to Mr. P~, who had custody at the time of adjudication. This is consistent with Agency policy. *See* GN 00603.070(B)(1). After Mr. P~ received the funds, he refused to distribute any of the funds to Ms. P~, who had custody of the three children during the time period covered by the retroactive payments. She then filed an action in the Wayne County Circuit Court of the State of Michigan. *See* Mich. Comp. Laws Ann. § 722.3(2) (action to enforce child support obligations). The Court subsequently issued a three-part order. First, the Wayne County Friend of the Court was ordered to release $696 to Ms. P~. It is unclear whether these are funds from the Agency or other funds (such as child support from Mr. P~) in its possession. Second, Mr. P~ was ordered to pay $1,863 to Ms. P~. Third, the Wayne County Friend of the Court was ordered to re-consider the issue of child support. The Agency had advised Mr. P~ to contact the Agency if the court issued a payment order, and Mr. P~ did so. You have submitted the court documentation to us for review based on GN 00602.120(B)(2) that requires solicitation of our opinion in such a case.

DISCUSSION

As an initial matter, it is well established that the Agency is not bound by a state court order. *See Hercules Inc. v. United States*, 516 U.S. 417, 422-23 (1996), citing *United States v. Testan*, 424 U.S. 392, 399 (1976) and *United States v. Sherwood*, 312 U.S. 584 (1941). However, in this situation, the Agency is not a party to this order and has not been asked or

ordered to take any action. The issue is whether the provision in the court order that $1,863 of the benefits payments be made to Ms. P~ (the amount would be increased by $696 if the amounts held by the Friend of the Court were also retroactive payments) is an improper assignment of benefits. Section 407 of Title 42 of the United States Code provides:

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407(a) (emphasis added).

The Agency is not being directed to pay the amount to the mother. *See Rose v. Rose*, 481 U.S. 619, 635 (1987) ("Thus, while it may be true that these funds are exempt from garnishment or attachment while in the hands of the Administrator, we are not persuaded that once these funds are delivered to the veteran a state court cannot require that veteran to use them to satisfy an order of child support."). The court order is directed to Mr. P~, the father of the children. Although the court order references the benefits "he received which were retroactive while the child was in the custody of the mother" it is somewhat unclear whether the Court was ordering Mr. P~ to release the children's funds to the mother for child support or as a debt payment.

In either case, the Court cannot re-direct the children's funds to their mother. The court cannot order that benefits belonging to the children be used

to satisfy Mr. P~'s to pay child support.
Furthermore, Ms. P~, who was not a representative payee during the time she had custody (because there is no need for a representative payee until benefits were issued), was already required, as the children's mother, to support the children. *See* Mich Comp. Laws. Ann § 722.3 (parents are jointly and severally obligated to support a minor). The children cannot contract with the mother to supply their basic needs with a promise to re-pay from future Social Security benefits because the obligation already rests with the parents. However, Social Security benefits may be used to reimburse parents for the cost of food, shelter, clothing, medical care, and personal comfort items, even if the parent would be required, by state law, to provide for their children's basic needs. *See Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler et. al.*, 123 S.Ct. 1017, 1027 fn. 11 (2002) (logic that reimbursement is valid applies equally to parents since they, like the department of social services, are "under a legal obligation to support their children's basic needs irrespective of Social Security benefits").
Nonetheless, Mr. P~ was required to use these past-due benefits for "the beneficiary's *current* maintenance." 20 C.F.R. § 404.2040(a) (emphasis added). The regulations provide that a "payee may not be required to use benefit payments to satisfy a debt of the beneficiary, if the debt arose prior to the first month for which payments are certified to a payee. If the debt arose prior to this time, a payee may satisfy it only if the current and reasonably foreseeable needs of the beneficiary are met." 20

C.F.R. § 404.2040(d). The Agency's Program Operations Manual System (POMS) explains that "[a]nyone who claims a share of the funds as reimbursement for care of the beneficiary during the months for which accrued benefits are payable should present his/her claim to the current payee. *See* GN 00602.030 -- Claims of Creditors." POMS GN 00603.070(B)(1). Consistent with the regulations, the POMS at GN 00602.030(A) provides that "[I]f the beneficiary's current needs and reasonably foreseeable needs are met, a payee may satisfy a beneficiary's past debt." *See* 20 C.F.R. § 2040(d). The POMS further explains that, "[a]s a flexible guideline, consider the beneficiary's current and reasonably foreseeable needs to be met if the beneficiary will have a reserve of two month's benefits after the past debt is paid and the entire ongoing monthly benefit is not needed to meet these needs." POMS GN 00602.030(A)(2). The Supreme Court has indicated that these regulations, and the POMS interpreting these regulations, are reasonable. *See Keffeler*, 123 S.Ct. at 1027 ("Commissioner's interpretation of her own regulations is eminently sensible and should have been given deference"). Thus, Mr. P~ may pay the child's past-due benefits to the child's mother, who had custody of the child during the time period covered by the past-due benefits, only if the current and reasonably foreseeable needs of the child are met within the meaning of the regulations and POMS, regardless of any court order to the contrary. When the children received the past due benefits, those benefits covered the time the mother had custody and the mother may have assumed that she

was entitled to be "reimbursed" out of those past due benefits. Certainly, the family court agreed with that assumption. When, as here, a court acts under state family law, the courts appear reluctant to invoke federal statutory provisions over state law. *Rose*, 481 U.S. 619, 628 ("Given the traditional authority of state courts over the issue of child support, their unparalleled familiarity with local economic factors affecting divorced parents and children, and their experience in applying state statutes. . . we conclude that Congress would surely have been more explicit had it intended the [Agency's] power to displace a state court's power to enforce an order of child support.").

The Agency is not liable if the father breaches his obligation to ensure proper use of all of the children's SSI payment. See 20 C.F.R. § 404.2041. However, Mr. P~ can be held personally liable for misuse of benefits and the Agency may change the representative payee or take any other action allowed under the regulations if Mr. P~ pays the amount and cannot establish that the funds were expended for the children's needs. 20 C.F.R. § 404.2050.

We recommend that the Agency consider sending a letter to Mr. P~ to clarify that the Agency is not bound by the state court order because, generally, state courts do not have jurisdiction and are prohibited under 42 U.S.C. § 407 from directing how the children's benefits are to be used. This letter would also clarify that Mr. P~ retains responsibility to ensure that the funds he receives as representative payee are properly spent. We suggest that you include language that explains that Mr. P~

was required to use these past-due benefits for "the beneficiary's *current* maintenance." 20 C.F.R. § 404.2040(a) (emphasis added). The regulations provide that a "payee may not be required to use benefit payments to satisfy a debt of the beneficiary, if the debt arose prior to the first month for which payments are certified to a payee. If the debt arose prior to this time, a payee may satisfy it only if the current and reasonably foreseeable needs of the beneficiary are met." 20 C.F.R. § 404.2040(d). The POMS explains that "[a]nyone who claims a share of the funds as reimbursement for care of the beneficiary during the months for which accrued benefits are payable should present his/her claim to the current payee. *See* GN 00602.030 -- Claims of Creditors." POMS GN 00603.070(B)(1). Consistent with the regulations, the POMS at GN 00602.030(A) provides that "[I]f the beneficiary's current needs and reasonably foreseeable needs are met, a payee may satisfy a beneficiary's past debt." *See* 20 C.F.R. § 2040(d). The POMS further explains that, "[a]s a flexible guideline, consider the beneficiary's current and reasonably foreseeable needs to be met if the beneficiary will have a reserve of two month's benefits after the past debt is paid and the entire ongoing monthly benefit is not needed to meet these needs." POMS GN 00602.030(A)(2). The Supreme Court has indicated that these regulations, and the POMS interpreting these regulations, are reasonable. *See Keffeler* 123 S.Ct. at 1027 ("Commissioner's interpretation of her own regulations is eminently sensible and should have been given deference"). Thus, Mr. P~ may pay the child's past-due benefits to the child's mother, who

had custody of the child during the time period covered by the past-due benefits, only if the current and reasonably foreseeable needs of the child are met within the meaning of the regulations and POMS, regardless of any court order to the contrary. We also recommend that you remind Mr. P~ that he may be personally liable for any misuse of funds. You may also wish to send an informational letter to the court explaining that, pursuant to 42 U.S.C. § 407, the court does not have jurisdiction to direct how the child's benefits can be used or paid. We recommend that you also include language as outlined above, explaining the circumstances under which the past-due benefits can be used to reimburse the mother for the expenses of maintaining the child.

CONCLUSION

We suggest sending an informational letter to the father and to the Court as outlined above.

Gary A. S~
Acting Regional Chief Counsel
Office of the General Council, Region V
Janet M. G~
Assistant Regional Counsel

PR 07211.046 South Dakota
A. PR 04-099 Court Order Directing Use of Monthly Social Security Benefits - Timothy D. M~, Jr.
DATE: March 22, 2004
1. SYLLABUS
The court order issued by the South Dakota Sixth Judicial District Court, Tripp County, is contrary to Social Security Administration regulations and policy. The court order violates section 207(a) of the Social Security Act (Act), 42 U.S.C. § 407(a). A state court may not direct the disposition of Social Security or SSI benefits by a representative payee. The representative payee has the responsibility to ensure that benefits are used only for the use and benefit of the beneficiary in the manner the payee determines to be in the best interests of the beneficiary.
2. OPINION
Your office has requested our assistance in reviewing a court order issued by the South Dakota Sixth Judicial District Court, Tripp County, to determine whether the order is contrary to Social Security Administration (SSA) regulations and policy. The court order directs that "1/2 of the [survivor's] benefit received" on behalf of Timothy D. M~, Jr. (Timmie) "be placed in a 529-account-educational-trust . . . for Timmie's college or vocational education after high school." Currently, Charles N~ is Timmie's representative payee. For the reasons set forth below, we believe the court order violates section 207(a) of the Social Security Act (Act), 42 U.S.C. § 407(a). *See* Memorandum from Regional Chief Counsel, Denver, to Regional Commissioner, Denver, *Court Order Directing Use of Monthly*

Social Security Benefits - John A. H~ (Revised) (July 15, 2003).

Section 207(a) of the Act states:

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407(a). *See also* POMS GN 02410.001.

"Under the Act, therefore, Social Security benefits and the associated rights under the Social Security Act are generally neither assignable nor subject to legal process. Indeed, section 207's broad bar against the use of any legal process to reach Social Security benefits includes not only all claimants or creditors, but also states." Memorandum from Regional Chief Counsel, Philadelphia, to Regional Commissioner, Philadelphia, *Pennsylvania Support Decree Assigning Social Security Payments - Rachel R. M~, SSN: ~*(March 25, 1994) (citing *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 416-17 (1973)).

"Federal courts have generally interpreted section 207 broadly. Courts have upheld the bar of section 207 when attempts have been made to alienate Social Security benefits from both recipients and representative payees." *Id.* (citing *Tidwell v. Schweiker*, 677 F.2d 560, 566-68 (7th Cir. 1982) (holding that a consent form, which a state psychiatric facility asked those seeking hospitalization to sign authorizing the facility to reimburse itself for the cost of hospitalization from the Social Security benefits of the individual,

violated section 207); *Woodall v. Bartolino*, 700 F. Supp. 210, 219-20 (S.D. N.Y. 1983) (holding that court orders may not properly be entered against Social Security benefits when they are managed by representative payees in order to enforce the application of the benefits to the care and maintenance of an institutionalized individual). "Furthermore, it is well-established that the Federal Government, as sovereign, is immune from suits in and the orders of state courts, unless the sovereign has consented to submit itself to the jurisdiction of such court, which in the present case, it has not." Memorandum from Regional Chief Counsel, Chicago, to Manager, Cleveland Downtown Field Office, *Charles C~, SSN ~, Advice About State Court Order to Appoint Representative Payee* (October 4, 2002) (citing United *States v. Sherwood*, 312 U.S. 584 (1941)).

Moreover, if Mr. N~ "complies with the court's order, []he may violate h[is] responsibilities as a representative payee." Memorandum, *Pennsylvania Support Decree, supra* (citing 42 U.S.C. § 1383(a)(2)). "Under the regulations, a representative payee has the responsibility to ensure [that Social Security] benefits are used only for the use and benefit of the beneficiary in the manner []he determines to be in the best interests of the beneficiary." *Id.* (citing § 416.635); *see also* 20 C.F.R. § 404.2035. "In this case, it could be said that by complying with the court order, [Mr. N~] has allowed h[is] rights and responsibilities as a representative payee to be usurped: []he is not making the decisions about the use of the funds, but has turned them over to [the court] in accordance with the court order." *Id.*

In sum, section 207 of the Act is intended to protect the rights and benefits arising under the Act "from all attempts to use legal process to alienate them, unless Congress has specifically indicated otherwise." *Id.* We believe the court's order, which can be construed as assigning control of Timmie's Social Security benefits to another, is violative of section 207 because it constitutes legal process that seeks to affect rights arising under the Act. "Identifiable Social Security benefits cannot be taken by judicial order, and in this case it appears that they have been." *Id.* (citing Woodall, 700 F. Supp. at 221). Moreover, in the state court process used here, the state court has taken upon itself the authority to decide who shall manage the child's Social Security benefits, and how they shall be managed. However, Congress has granted the power to make that selection exclusively to the Commissioner in section 205(j) of the Act, and the Commissioner's regulations and decisions issued thereunder are clearly to be given deference. *See Washington Dep't of Social and Health Servs. v. Guardianship Estate of Danny Keffeler*, 123 S.Ct. 1017 (2003). Because the state court's actions are contrary to the controlling Federal statute and the decision of the Commissioner issued thereunder, the state court's attempt to assume such authority must fail under the Supremacy Clause of the United States Constitution._11 .

As a matter of litigation policy, SSA does not get involved in section 207 issues that arise after payment to the beneficiary has been completed. Therefore, if any court action is to be taken at this

time, Mr. Novotny, the person subject to the court's order, through his attorney, should take it.
Yvette G. K~
Acting Regional Chief Counsel, Region VII
By _____
Allan D. B~
Assistant Regional Counsel
"The Supremacy Clause of the Constitution, Article VI, cl. 2, states that the 'Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.' The Supreme Court has recognized it 'is a seminal principle of our law that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States and cannot be controlled by them.'" Memorandum from OGC Policy and Legislation Division, to Office of Disability Division of Medical and Vocational Policy, Issues Related to Disability Examiners Ordering Consultative Examinations and Tests and Medical and Psychological Consultants Developing Cases for Disability Determination Services (DDS) in Other States (August 21, 1998) (citing *Hancock v. Train*, 426 U.S. 167, 178 (1976) (internal quotation marks omitted).

PR 07211.055 Wisconsin
A. PR 03-159 SSI - Wisconsin - Court Order for Payment of Funds by Gregory S~ to Susan M. S~ - REPLY Our Ref. No.: 03-P-063
DATE: July 22, 2003
1. SYLLABUS
A court order directing how a representative payee uses a beneficiary's social security benefits is not binding on the payee. Section 207 of the Social Security Act prohibits attempts to direct the disposition of benefits certified to a representative payee. If a court order directs a payee how to use an individual's social security benefit, the payee can use section 207 as a defense against such action.
2. OPINION
Pursuant to the direction of POMS § GN 00602.120(2), you have requested our opinion regarding an order issued by the Barron County Circuit Court Family Court Branch, Wisconsin requiring Gregory S~ to pay funds to his ex-wife Susan M. S~. We conclude that the Agency is not bound by the court order, and does not need to take any legal action with respect to the order. However, the Agency may wish to send a letter to Gregory S~ and/or the court explaining the court's lack of authority on this issue and a representative payee's responsibilities with respect to the benefits.
BACKGROUND
As we understand the facts, Gregory S~ is currently serving as the representative payee for their minor child, Robert's SSI benefits. At the time of the initial application, both parents were living together but Susan S~ was not made the representative payee because she was known to the field office as a recipient of SSI benefits and may have not been competent to serve as representative payee.

On March 24, 2003, pursuant to divorce proceedings, Barron County Circuit Judge James E~ issued an order. The order directs that both Gregory S~ and his ex-wife Susan S~ be awarded joint legal custody and share share physical custody of their minor child, Robert. The order also directs that Susan S~ be awarded specific placement including alternating weekends, every Tuesday, Monday, Wednesday, Thursday and alternating Fridays from after school until the conclusion of Gregory S~'s workday, school snow days and Robert's sick days during Gregory S~'s work hours. Gregory S~ has placement at all other times. The court order further directs that "[n]either party shall pay child support to the other. If the Social Security Administration continues to pay SSI for Robert, Susan S~ shall receive such payment."

DISCUSSION

It is well established that the Social Security Administration is not bound by a state court order. *See* United States Const. art. VI, Cl. 2 (the Supremacy Clause); *Hercules Inc. v. United States*, 516 U.S. 417, 422-23 (1996). However, in this situation, the Agency is not a party to this order and has not been asked or ordered to take any action. The issue is whether the provision in the court order that Robert's SSI benefit payments be made to Susan S~ is an improper assignment of benefits. Section 407 of Title 42 of the United States Code provides:

The right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment,

or other legal process, or the operation of any bankruptcy or insolvency law.

42 U.S.C. §§ 407(a), 1383(d)(1) (emphasis added).

The Agency is not being directed to pay the amount to the mother but the court order is directed to Gregory S~, Robert's father. *See Rose v. Rose*, 481 U.S. 619, 635 (1987) ("Thus, while it may be true that these funds are exempt from garnishment or attachment while in the hands of the Administrator, we are not persuaded that once these funds are delivered to the veteran a state court cannot require that veteran to use them to satisfy an order of child support.").

It is unclear whether the court is ordering Gregory S~ to release Robert's funds to the mother for child support as the order specifically references the payment of SSI benefits to Susan S~ under the "Child Support" section of the order. This is somewhat confusing since the court order specifically directs that "[n]either party shall pay child support to the other." It appears that the court order is based on the grounds that Susan S~ will require money to provide for Robert's needs when she has physical custody of him and presumably, will use the money for Robert's basic needs while he is in her care. However, Susan S~ is not the representative payee. As representative payee, Gregory S~, still retains the obligation to ensure that all funds, including those given to the mother, are used for Robert's needs, i.e., for food, shelter, clothing, medical care, and personal comfort items. *See* 20 C.F.R. §§ 416.635, 416.640, 416.665. A court cannot assign a representative payee for a Social Security claimant or direct the disposition of benefits certified to a representative payee. Designation of a representative payee is reserved solely to the

Agency, which may also change the rep payee. 42 U.S.C. § 1383(a)(2); 20 C.F.R. §§ 416.601-416.665. Even if the court's direction of the benefits in this case is intended to benefit Robert, it is still invalid. *Id.* The court does not have authority to direct that Susan S~ receive Robert's SSI funds. 42 U.S.C. § 407(a). *See Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler* et. al., 123 S.Ct. 1017, 1027-28 (2003) (section 407(a) barred State's legal action when not acting as a representative payee despite providing for the care and maintenance of a beneficiary); *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 416-17 (1973) (section 407 "imposes a broad bar against the use of any legal process to reach all social security benefits."). The court's direction of Robert's SSI funds is thus directing benefit monies by a "legal process" and is prohibited by statute. We recommend that the Agency consider sending a general informational letter to Gregory S~ and/or the court to clarify that the Agency is not bound by a state court order because, generally, state courts do not have jurisdiction and are prohibited under 42 U.S.C. § 407 from directing to whom benefits will be paid. This letter would also clarify that the representative payee Social Security selects to receive the benefits retains responsibility to ensure that the funds he receives as representative payee are properly spent. A representative payee is obligated under federal law to properly use the funds only for the recipient's use and benefit. *See* 20 C.F.R. §§ 416.635, 416.640, 416.665. The Agency is not liable if the representative payee breaches his obligation to ensure proper use of all of the SSI recipient's benefit payments. *See* 20 C.F.R. § 416.641. However, the representative payee can be

held personally liable for misuse of benefits. The Agency may change the representative payee or take any other action allowed under the regulations if the representative payee pays the benefits to another, including another parent, and cannot establish that the funds were expended for the SSI recipient's needs. *See* 20 C.F.R. § 416.650.

CONCLUSION

In sum, we conclude that we should not take any court action regarding the order. However, we suggest sending an informational letter to Gregory S~ and/or the Court as outlined above.

Kim Leslie B~
Acting Regional Chief Counsel, Region VII
By _____
Thomas H. K~
Assistant Regional Counsel

_11There is a statutory exception to provide garnishment from social security payments to fulfill child support obligations, which is not at issue in this case since these benefits are for the child, who does not owe any child support obligation. 42 U.S.C. § 659.

B. PR 03-172 Creditor Seizure Of SSI Benefits In Representative Payee's Bank Account - Gabrielle E. and Aaron B. M~

July 31, 2003

1. SYLLABUS

Section 207 of the Social Security Act prohibits attempts to direct the disposition of benefits certified to a representative payee. If a creditor attaches a beneficiary's account, for which a representative payee has only a fiduciary interest, the creditor's action violates section 207. A representative payee has no ownership interest in the benefits received on behalf of beneficiary and must use such benefits for

the current needs of the beneficiary. Failure to do so constitutes misuse and is grounds for a change of representative payee. A representative payee can use section 207 as a defense against attachment by creditors.

2. OPINION

You have asked for our opinion as to whether a creditor has the right to seize Title XVI benefits from a bank account that only contains Title XVI funds that belong to two children Gabrielle E. M~, ~ and Aaron B. M~, ~. Their mother, Chris D. N~, is their representative payee; therefore, her name is on the account as their payee. A collection agency (creditor) is automatically withdrawing the benefits because Ms. N~ has a debt with them. A Justice of the Peace in Great Falls, Montana, ruled that the funds were not Social Security funds, but a personal loan to the mother because she was on the account as representative payee. For the reasons set forth below, we believe the creditor's action violates section 207 of the Act. We also believe the court erroneously considers the children's SSI benefits to be property of their mother.

Section 207(a) of the Act, 42 U.S.C. § 407, states that:

(a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407(a). "This section is specifically incorporated into the statutory provisions pertaining to the SSI program by section 1631(d)(1) of the Act, 42 U.S.C. § 1383(d)(1)." Memorandum from Regional

Chief Counsel, Philadelphia, to Regional Commissioner, Philadelphia, Pennsylvania Support Decree Assigning Social Security Payments - Rachel R. McCarren, SSN: ~ (March 25, 1994). "Section 207(a) applies not only to funds in the hands of SSA that have not yet been paid out, but also to funds that have been disbursed." *Id.* (citing 42 U.S.C. § 407(a) ("none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process . . . ."). Indeed, the protections of section 207 continue to apply to the proceeds of a social security benefit or supplemental security income payment that is held in a bank account, so long as the funds can be traced to the Federal payment. *See Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 416-17 (1973); *Dean v. Fred's Towing*, et al., 245 Mont. 366, 371-372 (1990).

"Federal courts have generally interpreted section 207 broadly. Courts have upheld the bar of section 207 when attempts have been made to alienate social security benefits from both recipients and representative payees." Memorandum, Pennsylvania Support Decree, supra (citing *Tidwell v. Schweiker*, 677 F.2d 560, 566-68 (7th Cir. 1982) (holding that a consent form, which a state psychiatric facility asked those seeking hospitalization to sign authorizing the facility to reimburse itself for the cost of hospitalization from the social security benefits of the individual, violated section 207); *Woodall v. Bartolino*, 700 F. Supp. 210, 219-20 (S.D. N.Y. 1983) (holding that court orders may not properly be entered against social security benefits when they are managed by representative payees in order to enforce the application of the benefits to the care and maintenance of an institutionalized individual)).

"Federal courts have also enforced the protection of section 207 from post-judgment garnishment procedures that allowed the garnishment of bank accounts containing social security funds, where the procedures did not clearly distinguish these funds." Memorandum, Pennsylvania Support Decree, supra (citing *Finberg v. Sullivan*, 634 F.2d 50, 63 (3d Cir. 1980) (holding that bank accounts may not be attached without regard to whether they contain social security funds); *Reigh v. Schleigh*, 595 F. Supp. 1535, 1555 n.15 (D. Md. 1984) (holding that notice to debtors must inform them of the exemption of social security benefits from attachment); *Deary v. Guardian Loan Co.*, Inc., 534 F. Supp. 1178, 1187-88 (S.D. N.Y. 1982) (holding that judgment debtors were entitled to notice of both the exemptions to which they may be entitled and the procedures for assessing those exemptions).

The cases cited above "demonstrate how clearly and carefully courts have followed the language of section 207. As section 207 sets forth, 'none of the moneys paid . . . shall be subject to legal process.'" Memorandum, Pennsylvania Support Decree, supra (quoting 42 U.S.C. § 407). Thus, we believe the creditor's seizure of the children's SSI benefits constitutes an attachment that violates section 207. Moreover, Gabrielle and Aaron, the two children, are the individuals that SSA had found eligible for SSI payments, not Ms. N~, their mother. *See* Memorandum, Pennsylvania Support Decree, supra (citing 42 U.S.C. § 1382 (for definition of eligible individual)). Because the children are the individuals eligible for SSI payments, those payments are their property, not their mother's, who is simply their representative payee. *See id.* Representative payees have no ownership interest in

the SSI payments. They must use the payments for the use and benefit of the eligible individual. *See* 42 U.S.C. § 1383(a)(2)(ii)(I). Failure to do so constitutes misuse and is grounds for a change of representative payee. *See* 20 C.F.R. § 416.650(a); POMS GN 00604.001. "Although we have found no [Montana] cases precisely on point, we have found authority in other jurisdictions that support this proposition." *See* Memorandum, Pennsylvania Support Decree, supra (citing *Miller v. Shapiro*, 225 A.2d 644, 646 (Conn. Cir. Ct. 1966) (holding that child's insurance benefits are the child's property and not the parent's or the representative payee's)). Because the children's SSI benefits are not their mother's property, they may not be seized to discharge Ms. N~'s debt. *See id.*

In conclusion, "section 207 is intended to protect social security benefits from all attempts to use legal process to alienate them, unless Congress has specifically indicated otherwise." Memorandum, Pennsylvania Support Decree, supra. However, if any court action is to be taken at this time, Ms. N~ should take it, through her attorney. If Ms. N~ does not take action to stop the seizure of her children's benefits, SSA should appoint a new representative payee for Gabrielle and Aaron. Then the creditor will not have access to the children's funds.

Yvette G. K~
Acting Regional Chief Counsel, Region VII
By _____
Thomas H. K~
Assistant Regional Counsel

C. PR 03-155 Court Order Directing Use of Monthly Social Security Benefits - John A. H~(Revised)_11

DATE: July 15, 2003

1. SYLLABUS

Under section 207 of the Social Security Act, social security benefits and the associated rights under the SS Act are generally neither assignable nor subject to legal process. Section 207 prohibits attempts to direct the disposition of benefits certified to a representative payee. SSA does not get involved in section 207 issues that occur after payment to a beneficiary has been completed. If a court order directs a payee how to use an individual's benefits, the payee can use sectin 207 as a defense against such action.

2. OPINION

Your office has requested our assistance in reviewing a court order, issued by the Montana Thirteenth Judicial District Court, Carbon County, to determine whether the order is contrary to Social Security Administration (SSA) regulations and policy. The court order directs the guardian/conservator and representative payee, Tracy Johnson R~, to deposit the future Social Security benefits of John A. ~H (John), a minor child, in a restricted guardian/conservator account at Edward Jones, an investment company in Red Lodge, Montana. The court order further provides that Ms. R~ shall be paid a monthly stipend of $548 from the restricted account for John's care and support, i.e., current maintenance. You have informed us that John's monthly Social Security benefits amount is $1095. For the reasons set forth below, we believe the court order violates section 207(a) of the Social Security Act (Act), 42 U.S.C. § 407(a).

Section 207(a) of the Act states:

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this

subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law. 42 U.S.C. § 407(a). *See also* POMS GN 02410.001. "Under the Act, therefore, Social Security benefits and the associated rights under the Social Security Act are generally neither assignable nor subject to legal process. Indeed, section 207's broad bar against the use of any legal process to reach Social Security benefits includes not only all claimants or creditors, but also states." Memorandum from Regional Chief Counsel, Philadelphia, to Regional Commissioner, Philadelphia, *Pennsylvania Support Decree Assigning Social Security Payments - Rachel R. M~, SSN: ~* (March 25, 1994) (citing *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 416-17 (1973). "Federal courts have generally interpreted section 207 broadly. Courts have upheld the bar of section 207 when attempts have been made to alienate Social Security benefits from both recipients and representative payees." *Id.* (citing *Tidwell v. Schweiker*, 677 F.2d 560, 566-68 (7th Cir. 1982) (holding that a consent form, which a state psychiatric facility asked those seeking hospitalization to sign authorizing the facility to reimburse itself for the cost of hospitalization from the Social Security benefits of the individual, violated section 207); *Woodall v. Bartolino*, 700 F. Supp. 210, 219-20 (S.D. N.Y. 1983) (holding that court orders may not properly be entered against Social Security benefits when they are managed by representative payees in order to enforce the application of the benefits to the care and maintenance of an institutionalized individual). "Furthermore, it is well-established that the Federal Government, as sovereign, is immune from suits in

and the orders of state courts, unless the sovereign has consented to submit itself to the jurisdiction of such court, which in the present case, it has not." Memorandum from Regional Chief Counsel, Chicago, to Manager, Cleveland Downtown Field Office, *Charles C~, SSN ~, Advice About State Court Order to Appoint Representative Payee* (October 4, 2002) (citing *United States v. Sherwood*, 312 U.S. 584 (1941)).

Moreover, if Ms. R~ "complies with the court's order, she may violate her responsibilities as a representative payee." Memorandum, *Pennsylvania Support Decree, supra* (citing 42 U.S.C. § 1383(a)(2)). "Under the regulations, a representative payee has the responsibility to ensure [that Social Security] benefits are used only for the use and benefit of the beneficiary in the manner she determines to be in the best interests of the beneficiary." *Id.* (citing § 416.635); *see also* 20 C.F.R. § 404.2035. "In this case, it could be said that by complying with the court order, [Ms. R~] has allowed her rights and responsibilities as a representative payee to be usurped: she is not making the decisions about the use of the funds, but has turned them over to [the court and to Edward Jones] in accordance with the court order." *Id.*

In sum, section 207 of the Act is intended to protect the rights and benefits arising under the Act "from all attempts to use legal process to alienate them, unless Congress has specifically indicated otherwise." *Id.* We believe the court's order, which can be construed as assigning control of John's Social Security benefits to another, is violative of section 207 because it constitutes legal process that seeks to affect rights arising under the Act. "Identifiable Social Security benefits cannot be taken by judicial

order, and in this case it appears that they have been." *Id.* (citing *Woodall*, 700 F. Supp. at 221). Moreover, in the state court process used here, the state court has taken upon itself the authority to decide who shall manage the child's Social Security benefits, and how they shall be managed. However, Congress has granted the power to make that selection exclusively to the Commissioner in section 205(j) of the Act, and the Commissioner's regulations and decisions issued thereunder are clearly to be given deference. *See Washington Department of Social and Health Services v. Guardianship Estate of Danny Keffeler*, 123 S.Ct. 1017 (2003). Because the state court's actions are contrary to the controlling Federal statute and the decision of the Commissioner issued thereunder, the state court's attempt to assume such authority must fail under the Supremacy Clause of the United States Constitution._22

As a matter of litigation policy, SSA does not get involved in section 207 issues that arise after payment to the beneficiary has been completed. Therefore, if any court action is to be taken at this time, Ms. R~, the person subject to the court's order, through her attorney, should take it.

Yvette G. K~
Acting Regional Chief Counsel, Region VII
By _____
Thomas H. K~
Assistant Regional Counsel

_11 On November 5, 2002, we issued an opinion stating the court order did not contravene SSA regulations.

_22 "The Supremacy Clause of the Constitution, Article VI, cl. 2, states that the 'Constitution, and the laws of the United States which shall be made in

Pursuance thereof . . . shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, anything in the Constitution of Laws of any State to the Contrary notwithstanding.' The Supreme Court has recognized it 'is a seminal principle of our law that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States and cannot be controlled by them.'" Memorandum from OGC Policy and Legislation Division, to Office of Disability Division of Medical and Vocational Policy, *Issues Related to Disability Examiners Ordering Consultative Examinations and Tests and Medical and Psychological Consultants Developing Cases for Disability Determination Services (DDS) in Other States* (August 21, 1998) (citing *Hancock v. Train*, 426 U.S. 167, 178 (1976) (internal quotation marks omitted).